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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,
Petitioners,

vs.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Akron, Canton & Youngstown Railroad Company and the other 51 railroad companies and railroad trustees whose names for the purpose of brevity are set forth on Appendix A hereto[1] (said Appendix being incor-

1. Because the appendices required to be appended to this Petition are voluminous they are separately presented as "Appendices to Petition for Writ of Certiorari". The pages of each Appendix are separately numbered by reference to the letter in its heading.

porated herein by reference), all of whom were defendants below, collectively pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (sometimes herein referred to as the "Ninth Circuit") dated and entered in this case on August 28, 1975 (Appendix B hereto), and the Amended Opinion on which said judgment is based, affirming a judgment of the United States District Court for the Northern District of California which granted Respondents Pacific Fruit Express Company and Interstate Commerce Commission injunctive relief against Petitioners.

OPINIONS BELOW

The Opinion (Memorandum of Decision) of the District Court, dated March 2, 1973 (Appendix C hereto), which granted injunctive relief to Respondents Pacific Fruit Express Company and Interstate Commerce Commission, is reported at 355 F.Supp. 700 (1973). The Amended Opinion[2] of the Circuit Court of Appeals for the Ninth Circuit (Appendix D hereto) has not yet been officially reported.

JURISDICTION

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix D) was filed as of August 28, 1975 and that Court's judgment in this case

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2. The reasons why there is an Amended Opinion are as follows: On August 28, 1975 the Ninth Circuit filed its original Opinion and filed and entered its judgment. In that Opinion several erroneous statements were inadvertently made concerning one of the contentions of Petitioner Railroads. A timely petition for rehearing was filed which simply requested that the Opinion be modified to correct those errors. Accordingly, the Amended Opinion making the requested modifications was filed *as of* the same date, August 28, 1975. The time for filing this petition is computed from that date.

(Appendix B) was filed and entered on that date. This petition for writ of certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does Section 1(14)(b) of the Interstate Commerce Act (49 U.S. § 1(14)(b)), which requires that protective service contracts between railroad common carriers and third parties covering interstate shipments of perishables be submitted to and approved by the Interstate Commerce Commission, empower the Commission or the courts to require intermediate and terminating railroad carriers to enter into mechanical protective service contracts with respect to joint movements of perishables as to which there is such an approved contract between the originating carrier and the carline?

STATUTES INVOLVED

1. United States Code, Title 49, Section 1(13) (Interstate Commerce Act, Section 1(13)).
2. United States Code, Title 49, Section 1(14)(a) (Interstate Commerce Act, Section 1(14)(a)).
3. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)).

(The text of the listed statutes are set forth in Appendix G hereto).

STATEMENT OF THE CASE

On December 30, 1965 Respondent Pacific Fruit Express Company (herein referred to as "PFE") commenced this action to recover damages from Petitioners (herein referred to as "Petitioner Railroads") and a number of other railroads. The basis of jurisdiction of the District Court

was alleged to be 28 U.S.C. §§ 1331, 1332, 1337 and 1398. In the original and six amended and supplemental complaints an aggregate recovery in excess of $12,500,000 was sought, the basis of the damage claims being that under an order of Respondent Interstate Commerce Commission (herein referred to as "the Commission") made on August 27, 1962 in a proceeding known as *Ex Parte No. 137* (which order is reported at 318 I.C.C. 111 and is herein referred to as "the Commission's 1962 order," a copy being Appendix H hereto) each of Petitioner Railroads was obligated to pay its proportionate share of the annual deficits incurred by PFE in furnishing mechanical protective service to the railroad industry. Petitioner Railroads filed answers denying liability.

On June 18, 1970 PFE filed a motion for summary judgment on the liability issue. Petitioner Railroads filed opposing affidavits and also motions (1) for judgment on the pleadings because the subject matter of the action was within the exclusive jurisdiction of the Commission or, alternatively, (2) for a stay of the action and reference to the Commission because the subject matter was within its primary jurisdiction.

By orders dated November 16, 1971 and January 20, 1972 the District Court referred to the Commission certain questions which it considered to be within the primary jurisdiction of the Commission. On March 8, 1972 the Commission transmitted its Report and Order (Appendix E hereto) replying to the District Court's questions (340 I.C.C. 754).

A request for injunctive relief became a part of the case on April 28, 1972 when PFE by an amendment to its Fifth Amended Complaint included as Count II a cause of action for an injunction. The amendment added the Commission

and Respondent United States of America (herein referred to as "the United States") as defendants in that count, which sought an injunctive order requiring Petitioner Railroads to comply with the Commission's 1962 order. The basis of jurisdiction of the District Court on that count was alleged to be 28 U.S.C. §§ 1336, 1398 and 2321. Petitioner Railroads filed answers denying the charging allegations. On July 21, 1972 the Commission filed a motion to intervene as a plaintiff and to file a complaint for an injunction, the proposed complaint parallelling PFE's injunctive count and on September 27, 1972 the United States filed a motion to be realigned as a plaintiff. These motions were granted.

On August 9, 1972 PFE filed a motion for summary judgment on the injunction issue. Petitioner Railroads filed opposing affidavits raising factual questions together with a memorandum in opposition to the motion. At the hearing of November 3, 1972 on PFE's motion for summary judgment for an injunction the Commission orally joined in the motion and was permitted to do so.

On December 11, 1972 the District Court entered a brief order granting (1) the PFE motion for summary judgment on the liability issue (but reserving determination of the damage issue) and (2) the motions of PFE and the Commission for injunctive relief. The order recited that a Memorandum containing the background of the litigation and findings and conclusions would be issued in due course. Accordingly on March 2, 1973 the District Court issued its opinion entitled "Memorandum of Decision" (Appendix C) setting forth its reasons for, and its findings of fact and conclusions of law in connection with, its order granting the summary judgments. On March 7, 1973 the District Court made and entered its Judgment and Order on the injunction issue (Appendix F hereto).

An appeal was noticed on May 1, 1973 by Petitioner Railroads pursuant to 28 U.S.C. § 1292(a)(1) "from the injunctive relief" granted by the District Court's judgment. The appeal was limited to the injunctive aspect, since there is no final decision of the District Court on the liability and damage aspect which is appealable.

Turning to the factual background of the case, PFE is a carline company owned in equal shares by Southern Pacific Transportation Company and Union Pacific Railroad Company (herein respectively referred to as "S.P." and "U.P."). PFE is not a common carrier by railroad. *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968). PFE owns or leases in excess of 10,000 mechanical refrigerator cars which it furnishes to common carriers for the transportation of perishables. Petitioner Railroads are common carriers by rail, generally operating in the Eastern, Southern and Midwestern parts of the country, east of the railroad gateway points of Omaha, Council Bluffs, Kansas City and Chicago.

The basis of PFE's case is that under the Commission's 1962 order (Appendix H) each of Petitioner Railroads became obligated to enter into contracts for mechanical protective service with PFE and to pay PFE its proportionate share of the annual deficits incurred by PFE in furnishing such service to the railroad industry. As to injunctive relief, the claim is founded on the assertion that Petitioner Railroads are in violation of the Commission's 1962 order because they did not enter into such contracts with PFE.

The mechanical refrigeration cars of PFE contained, as component parts, mechanical refrigeration units which were used to provide protective service to shipments of perishables. This case does not involve any controversy with respect to the refrigerator *cars*, as distinguished from the

mechanical refrigeration *units*. "Car service" is covered by Section 1(14)(a) of the Interstate Commerce Act (herein referred to as "the Act").[3] The subject matter of this case is limited to the furnishing of the mechanical refrigeration units and to "protective service against heat or cold" to property transported in interstate commerce, the latter subject being covered by Section 1(14)(b) of the Act. That section, the text of which is set forth in full in Appendix G, makes it unlawful for any common carrier by rail to enter into any contract with any person for the furnishing to such carrier of such protective service "unless and until such contract, agreement or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest . . ."

With respect to the movements of perishables in PFE mechanical refrigerator cars which this case involves the following is the factual background:

1. Those movements are eastbound shipments as to which S.P. and U.P., the parents of PFE, are the originating carriers and Petitioner Railroads are intermediate or terminating carriers.

2. As common carriers, railroads are obligated to provide shippers protective service for perishable freight. As between railroads participating in a joint movement of perishables, the originating carrier has the duty of providing the refrigerator cars to the shipper and making the choice of what cars shall be used.

3. Thus, the decision to select and use PFE mechanical refrigerator cars in the perishable movements involved in this case was made by PFE's parent companies, as originating carriers. Petitioner Railroads, being intermediate

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3. The Interstate Commerce Act is embodied in Title 49 of the United States Code, the numbers of the sections of the Act and of the title being identical.

or terminating carriers, had no voice in such decision and selection. When the PFE cars were tendered at interchange points to Petitioner Railroads, they were compelled, as common carriers, to accept the PFE cars for movement over their lines provided only that they were in safe operating condition.

4. While the PFE cars were on the lines of Petitioner Railroads all inspection, starting, stopping, regulating, fueling, repairing and other servicing relating to the operation of the units was performed by Petitioner Railroads or by third parties engaged by them. All services, functions and obligations with respect to the PFE cars and their mechanical refrigeration units at interchange points which were required by the rules of the National Perishable Freight Committee were performed by Petitioner Railroads or their contractors, and not by PFE.

5. PFE neither furnished nor performed any services whatever on its mechanical refrigeration units while they were on the lines of Petitioner Railroads. In the territories served by Petitioner Railroads PFE had no employees, facilities or means of furnishing or performing any servicing of any equipment of any kind to or for any of Petitioner Railroads. Consequently, Petitioner Railroads were compelled to perform such servicing themselves or through their contractors.

Turning to the background for the Commission's 1962 order,[4] that order arose out of a general investigation un-

4. The validity of the Commission's 1962 order is the subject matter of an action now pending before a three-judge court convened pursuant to 28 U.S.C. § 2284 in the District Court for the District of Columbia. That action, *Southern Railway Company, et al., v. United States*, Civil No. 1776-73, has been under submission on the merits since May 27, 1975. The plaintiffs in that action are some of Petitioner Railroads in this case.

dertaken by the Commission in 1959 as to the reasonableness of charges for mechanical protective service under contracts requiring Commission approval under Section 1(14)(b), (318 I.C.C. 111-112, Appendix H hereto, p. H-2). By its 1962 order the Commission prescribed provisions to be included in all mechanical protective service contracts which were submitted to it for approval. Those prescribed conditions were incorporated by the Commission in regulations included in the Code of Federal Regulations and published in the Federal Register.[5]

In the concluding paragraphs of its 1962 order the Commission found that the unapproved protective service contracts which were before it were just and reasonable, provided that within 120 days the railroads filed new or superseding contracts consistent with the regulations adopted by the Commission and referred to above. The paragraph further provided as follows:

> "In the event new or superseding contracts are not filed, *further consideration will be given to the issuance of an order* finding the presently unapproved contracts not within the requirements of section 1(14)(b)."
>
> (318 I.C.C. 127, Appendix H. hereto, p. H-27; emphasis added)

It is conceded that no such further order has ever been made.

Paragraph (a) of the Commission's regulations set forth in Appendix G to the 1962 order contained the following final sentence:

> "The contracts required herein to be filed shall supersede all prior contracts, *including Division Sheet 7*,

5. See Appendix G to 1962 order, 318 I.C.C. 137-138 (Appendix H hereto, p. H-39); 49 C.F.R. § 1032.2; 27 F.R. 9406, September 21, 1962.

and such contracts and those filed thereafter shall conform in substance to the provisions set forth in subsections (b), (c), (d), (e), (f) and (g)."

(318 I.C.C. 138, Appendix H hereto, p. H-40)

Since the Commission's 1962 order Petitioner Railroads have continued to observe and comply with Division Sheet 7. They have not entered into mechanical protective service contracts with PFE for a variety of reasons, including the following: (1) that as intermediate or terminating carriers they, as distinguished from the originating carriers (S.P. and U.P., the parents of PFE), do not have any relationship with PFE which requires such contracts; (2) that the furnishing of a mechanical protective unit is not the furnishing of mechanical protective service within the contemplation of Section 1(14)(b) of the Act; and (3) that Division Sheet 7 was filed with the Commission, was conditionally approved by the 1962 order and that no further order has ever been made by the Commission setting aside that conditional approval, as provided for in the Commission's order.

On the other hand, S.P. and U.P., the originating carriers of the perishable shipments involved in this case, did enter into a protective service contract with PFE on June 5, 1963 (effective January 1, 1964) which covered mechanical protective service. That contract was approved by the Commission pursuant to Section 1(14)(b) on September 9, 1963 and remained in effect during the period covered by the complaints. But PFE's parents have not entered into protective service contracts with any other of the nation's carlines covering shipments in which they, like Petitioner Railroads, are intermediate or terminating carriers rather than originating carriers.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Holding That the Commission's 1962 Order Either Established a Contractual Relationship, or Ordered That One Be Entered Into, Between Petitioners and PFE, Exceeds the Congressional Grant of Authority Provided in Section 1(14)(b) of the Act and Decides an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The decision below, in holding that there was a contractual relationship, or that such a relationship was required to be entered into, between Petitioner Railroads and PFE requiring mechanical protective contracts between them under Section 1(14)(b) of the Act, is without foundation in law and is an unwarranted interpretation of that section. In so holding, the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

As a consequence of the decisions of the District Court and the Ninth Circuit in this case, the railroad industry of this country is now confronted with a series of lawsuits by other carlines and companies furnishing refrigerator cars containing mechanical refrigeration units. Such suits, commenced in a number of district courts, are founded on the identical premises involved in the present case and seek injunctions and the recovery of many millions of dollars. It is essential, for the conservation of judicial time and energy and the establishment of uniformity of decision, that this Court assume jurisdiction of this case and settle the question as to the meaning and effect of Section 1(14)(b). This Court has not previously considered and ruled on the question.

The primary facts relating to the use of PFE refrigerator cars and mechanical protective units by Petitioner Railroads were found by the Ninth Circuit to be as follows:

> "The use of PFE cars on appellants' lines is occasioned by the fact that Union Pacific and Southern Pacific, as originating carriers on eastbound shipments, select these PFE cars to transport perishables to the East. Appellant railroads as common carriers are required by law to accept, and do accept, such cars at interchange points to transport perishables over their respective lines to ultimate destinations. The mechanical units in the refrigerated cars are used by appellants to supply MPS."
>
> (Amended Opinion, Appendix D, p. D-4)

Virtually identical findings were made by the District Court (Memorandum of Decision, Appendix C, p. C-2).

It is undisputed that U.P. and S.P., the originating carriers of the perishable shipments involved in this case, had entered into a contract with PFE on June 5, 1963 (effective January 1, 1964) which covered mechanical protective service and which applied to these shipments of perishables. On September 9, 1963 that contract was approved by the Commission pursuant to Section 1(14)(b) and it remained in effect over the years covered by PFE's complaints in this case.

The District Court's Judgment and Order which has now been affirmed by the Ninth Circuit commanded Petitioner Railroads to enter into mechanical protective service contracts with PFE and to submit such contracts to the Commission for approval under Section 1(14)(b) (Appendix F, p. F-3). Having in mind (1) that Petitioner Railroads were intermediate or terminating carriers with respect to the perishable shipments here involved and (2) that the

originating carriers of such shipments, who selected and obtained from PFE the cars and units used in such shipments, had in effect a protective service contract with PFE which had been approved by the Commission pursuant to Section 1(14)(b), the question is presented whether in such circumstances Section 1(14)(b) empowers the Commission or the courts to require that these intermediate and terminating carriers enter into mechanical protective service contracts with PFE.

In the Amended Opinion the Ninth Circuit considered Petitioner Railroads' contention that there was no relationship between them, as intermediate and terminating carriers, and PFE which brought Petitioner Railroads within the purview of Section 1(14)(b). The Ninth Circuit disposed of the contention by this pronouncement:

> "We are satisfied that the effect of the ICC order, whether it established a contractual relationship, or merely ordered that a contractual relationship be entered into, has the effect of placing the parties in such relationship to one another as to permit enforcement under § 16(12)."
>
> (Amended Opinion, Appendix D, p. D-10)

The obvious effect of this holding is to read into the limited Congressional grant of authority embodied in Section 1(14)(b)—which is only that of approval of protective service contracts—the additional but unauthorized grant of command—the power to require the making of protective service contracts.

Section 1(14)(b)[6] is a very limited statute. By its provisions all that it does is to make it unlawful for any com-

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6. Section 1(14)(b) was added to the Act by the Transportation Act of 1940 (54 Stat. 898, 76th Cong. 2d Sess. Chap. 722; September 18, 1940), which embodied a number of amendments and

mon carrier by railroad to enter into any protective service contract with any person

> ". . . unless and until such contract, agreement or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest . . ."[7]

To point up the narrow scope of this statutory authorization with respect to protective service contracts, a comparison may be made with Sections 1(13) and 1(14)(a), relating to "car service." By Section 1(13) the Commission is authorized to require, by general or special orders, all rail carriers to file their rules and regulations with respect to car service. But beyond that, Section 1(14)(a) authorizes the Commission, after hearing, to "establish reasonable rules, regulations, and practices with respect to car service . . . including the compensation to be paid and any other terms of any contract, agreement or arrangement for the use of any locomotive, car or other vehicle . . ."[8]

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revisions of the Interstate Commerce Act which had been under consideration by the Congress in the late thirties. The addition of Section 1(14)(b) was not proposed in the original House or Senate bills, and it first appeared in a Conference Committee report of April 26, 1940 (Conference Report, Transportation Act of 1940; H. Rept. 2016, 76th Cong. 3d Sess., House Misc. Repts. Vol. II, p. 60; April 26, 1940). Congress could not have had mechanical protective service in mind when it adopted Section 1(14)(b) in 1940, because at that time there was no such thing. As the Commission pointed out in its 1962 order, prior to 1953 protection of perishables from heat or cold required the supplying of ice and salt to the refrigerator cars and of fuel to car heaters. As late as December 1959 three principal carlines had a fleet of 22,000 refrigerator cars, of which only 1,200 were mechanically refrigerated.

7. For the full text of Section 1(14)(b) see Appendix G, p. G-1-2).

8. Sections 1(13) and 1(14)(a) are set forth in full in Appendix G, p. G-1).

Thus, as to "protective service" the Commission's authority is merely to approve; as to "car service" it has been granted the authority to command. These differences in the Congressional grants of authority with respect to "protective service", on the one hand, and "car service", on the other hand, are not inadvertent. As this Court pointed out in construing other sections of Section 1 of the Act, Congress in enacting the various provisions of Section 1 "drew a distinction between what might be permitted and what compelled." *I.C.C. v. Oregon-Washington R. Co.*, 288 U.S. 14, 37 (1933).

This Court has recognized that there is a crucial distinction between the power of the Commission to approve an agreement which has been voluntarily entered into by a railroad and the power to require such an agreement. Thus, in *St. Joe Paper Co. v. Atlantic Coastline R. Co.*, 347 U.S. 298, 310 (1953) there was under consideration the authority of the Commission under Section 5 of the Act with respect to merger agreements. The Commission proposed to a district court a plan of reorganization under which a railroad involved in reorganization proceedings would have been compelled to merge with another railroad. This Court held that

> ". . . the very heart of § 5 is that a merger of two carriers may be approved by the Interstate Commerce Commission only if it originates as a voluntary proposal by the merging carriers."
>
> (347 U.S. 310)

This same distinction between the power of the Commission to approve and the power to command was recognized in *Neisloss v. Bush*, 293 F.2d 873, 878 (D.C.Cir. 1961), which also involved the Commission's authority under Section 5

of the Act with respect to the approval of mergers. Mr. Justice Reed, sitting by designation in that case, said this:

> "However, we find in that section only an authorization for the Commission to consider and approve transactions of the nature of those here at issue. There is no language of command in the section . . ."
>
> (293 F.2d 878)

The Amended Opinion ignores the distinction between the power to approve and the power to command. It converts the power to approve protective service contracts granted under Section 1(14)(b) into the power to command entry into such contracts. When Congress considered it appropriate to do so, as with respect to car service in Section 1(14)(a), it has included in the Act language granting the power to command. But it did not grant that power in Section 1(14)(b).

CONCLUSION

This Court has never considered or given guidance on the effect of the provisions of Section 1(14)(b) of the Act. Yet its decisions in *Oregon-Washington R. Co.* and in *St. Joe Paper Co., supra*, indicate that in determining the scope of authority granted by various sections of the Interstate Commerce Act the distinction between the power to approve and the power to command has been recognized and enforced. In the interests of justice, the effective administration of the federal judicial system, and the conservation of judicial time and energy this Court should grant certiorari

in order to settle the important question of federal law presented in this petition.

Dated: November 24, 1975.

Respectfully submitted,

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Of Counsel

(Appendices Follow)

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No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,
Petitioners,

vs.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendix A

List of Petitioners

The Akron, Canton & Youngstown Railroad Company
Atlanta and West Point Railroad Company
Atlantic Coast Line Railroad Company
The Baltimore and Ohio Railroad Company
Boston and Maine Corporation
Burlington Northern Inc.
Canadian National Railways
Canadian Pacific Railway
The Central Railroad Company of New Jersey
Central Vermont Railway Company
The Chesapeake and Ohio Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago Great Western Railway Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
The Chicago, Rock Island and Pacific Railroad Company
Chicago South Shore and South Bend Railroad
Clinchfield Railroad Company
The Colorado and Southern Railway Company
Columbia, Newberry & Laurens Railroad
The Delaware and Hudson Railroad Corporation
Delaware and Hudson Railway Company
The Detroit, Toledo and Ironton Railroad Company
Elgin, Joliet and Eastern Railway Company
Erie Lackawanna Railroad Company
Erie Lackawanna Railway Company
Florida East Coast Railway Company
Fort Worth and Denver Railway Company
Georgia Railroad
Grand Trunk Western Railroad Company
Great Northern Railway Company
Gulf, Mobile & Ohio Railroad
Illinois Central Railroad Company
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
The Kansas City Southern Railway
The Lehigh and Hudson River Railway Company
Lehigh Valley Railroad Company
The Long Island Rail Road Company

Louisville & Nashville Railroad Company
Maine Central Railroad Company
Midland Valley Railroad Company
Norfolk and Western Railway Company
Northern Pacific Railway Company
Piedmont and Northern Railway Company
Raritan River Railroad
St. Louis-San Francisco Railway Company
Seaboard Air Line Railroad Company
The Texas Mexican Railway Company
Toledo, Peoria & Western Railroad Company
Western Maryland Railway Company
John F. Nash and Robert C. Haldeman,
Trustees of Lehigh Valley Railroad Company
Robert W. Meserve and Charles W. Bartlett,
Trustees of Boston and Maine Corporation

Appendix B

Judgment of Court of Appeals for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

No. 73-2184
DC# 44601

Pacific Fruit Express Company,
Plaintiff-Appellee,

Interstate Commerce Commission &
United States of America,
Intervening Plaintiffs-Appellees,

vs.

Akron, Canton & Youngstown Railroad
Company, et al.,
Defendants-Appellants.

APPEAL from the United States District Court for the NORTHERN District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered August 28, 1975

Appendix C

Opinion of District Court

United States District Court

Northern District of California

No. 44601

Pacific Fruit Express Company, a corporation,

Plaintiff,

vs.

Akron, Canton & Youngstown Railroad Company, et al.,

Defendants.

MEMORANDUM OF DECISION

(Dated and filed March 2, 1973)

SWEIGERT, J.

This is a civil action for damages brought by Pacific Fruit Express (PFE) seeking to recover from 90 mid-eastern, eastern and southern railroad common carriers, an amount alleged to be in excess of 12.5 million dollars, representing compensation claimed to be due PFE for the use by defendant railroads of plaintiffs' mechanical protective services supplied them through PFE refrigeration cars moving over the lines of defendants in the transportation of perishable commodities; PFE also seeks an injunction to compel defendants to comply with a certain order of the Interstate Commerce Commission (I.C.C.) hereafter referred to.

The case is now before the court on plaintiffs' motion and defendants' counter motion for summary judgment on

the issue of liability as related to both damages and injunction. With respect to injunctive relief the United States, realigned as a party plaintiff herein, and I.C.C., intervenor as a party plaintiff, join in the PFE motion.

PFE is a car-line company, wholly owned by the Union Pacific Railroad Company (UP) and Southern Pacific Transportation Company (SP) engaged in the business of furnishing to railroads refrigerated cars containing mechanical refrigeration units and supplying mechanical protective service for perishable commodities against heat and cold.

The use of PFE cars on defendants' lines is occasioned by the fact the UP and SP, as originating carriers on eastbound shipments, select these PFE cars to transport perishables to the East. Defendant railroads as common carriers are required by law (§§ 1(3)a and 1(4) ICA) to accept and do accept such cars at interchange points to transport perishables over their lines to ultimate destinations and the units in the cars are used by them to supply mechanical protective service.

The complaint charges in substance and effect that PFE has provided defendants with this protective service but that defendants have failed and refused to enter into certain contracts to pay amounts sufficient to cover PFE's costs of providing such service despite the fact that such contracts were ordered on August 27, 1962, by the Interstate Commerce Commission in its order entitled "Contracts for Protective Services," (Ex Parte 137, 318 I.C.C. III, 49 C.F.R. 105.2 (1962)) issued pursuant to the Interstate Commerce Act, 49 U.S.C. § 1(14)(b), (that order is attached as an exhibit to and incorporated into the complaint).

Alleging that its receipts from defendant railroads in the past and up to the present time for said protective service, under a so-called Division Sheet 7 arrangement[1] among the defendant railroads, have been insufficient to cover the costs thereof, PFE seeks to recover from each of the defendant railroads its share of the costs of said service—essentially the difference between the payments made to PFE under that Division Sheet 7 arrangement and the amount PFE would have received if defendants had entered into the contracts as required by the I.C.C. order of August 27, 1962.

So far as damages are concerned the action is brought pursuant to 49 U.S.C. § 8 (§ 8 of the I.C.C. Act), 49 U.S.C. § 9 (§ 9 of the Act).

Section 8 provides that in case any common carrier does anything prohibited by the Act or omits to do anything required by the Act, the carrier shall be liable to the person injured for the full amount of damages sustained in consequences thereof, together with reasonable counsel fees; Section 9 provides that any person claiming to have been so damaged may make complaint either to the I.C.C. or may bring suit in District Court.[2] PFE also seeks recovery

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1. This Division Sheet 7 is an arrangement among the railroads themselves, issued by their National Perishable Freight Committee as agent for substantially all railroads. Under its provisions, 80% of the revenue collected by the railroads under their respective tariffs for mechanical protective service are paid by the participating railroads to the railroad initially handling the shipment which percentage is in turn paid over to the car owner, like PFE, for the mechanical refrigeration units in its cars. The remaining 20% of the tariff revenue is divided among all the railroads participating in the particular shipment. This is the basis on which PFE has been compensated.

2. Recovery of damages under Sec. 8 for violations of the Interstate Commerce Act has been sustained in a number of cases, including the following: *Nemitz v. Norfolk & W. Ry. Co.*, 436 F.2d 841 (6th Cir. 1971), *aff'd* in 92 S.Ct. 185 (1971). (Summary judg-

of its reasonable costs upon a quantum meruit theory to be hereafter considered.

So far as injunctive relief is concerned the action is brought pursuant to 49 U.S.C. § 16(12) which provides that, if any carrier fails or neglects to obey any order of the I.C.C. any party injured thereby may apply to the District Court for the enforcement of the order and the court may enforce obedience by injunction or other proper process.[3]

In its Order of August 27, 1962, Ex Parte 137 (1962), Contracts for Protective Services, 318 I.C.C. III, above mentioned, I.C.C. sought to determine, pursuant to 49 U.S.C. § 1(14)(b), the justness and reasonableness of charges for the use of mechanical refrigeration units and protective services as contained in various contracts and arrangements between railroads.

The Commission found that under the Division Sheet 7 arrangement, PFE and other car-lines furnishing mechanical protective service assume all of the operational costs of the mechanical units such as fuel, inspection and repairs —and that the 80% of tariff revenue received by the car owner bore no relation to these costs, (318 I.C.C. at 114-115) and that PFE expense of furnishing mechanical protective service exceeded by a substantial amount its revenue received for such service under Division Sheet 7.

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ment granted under Sec. 8 for damages arising from violations of the Act and an I.C.C. order;) *Brogan v. Pennsylvania R.R. Co.*, 211 F.Supp. 881 (N.D. Ill. 1962). (Damages awarded under Sec. 8 for violations of the Act and an I.C.C. order;) *Wright v. Chicago, B. & O. R.R. Co.*, 223 F.Supp. 660 (N.D. Ill. 1963). (Compensatory and punitive damages for violation of the Act;) *Minneapolis & St. L. Ry. Co. v. Pacific Gamble Robinson Co.*, 215 F.2d 126 (8th Cir. 1954). (Damages for violation of the Act.)

3. Both *Nemitz*, supra and *Brogan*, supra, granted injunctions to an injured party under Sec. 16(12), as well as damages under Section 8.

The Commission ordered (Par. (a)(b)(c)) that all railroads then receiving protective services under any contracts, agreements or arrangements should submit for approval to I.C.C. on or before 120 days from the effective date of the order new or superseding contracts covering protective services performed under contracts then on file with I.C.C. as well as those performed under Division Sheet 7—said new contracts to supersede all prior contracts, including Division Sheet 7, and to conform with other provisions of the order [i.e., subsections (b)(c)(d)(e)(f) and (g)]; the charge for each protective service to yield to the person performing such service no less than the cost (to which might be added a reasonable profit not in excess of 6% [Par. [c]) for performing the service, cost to be determined as set forth in subsection (d)(i) and (ii) of the order.

The order also provided (Par. (e)) that in the event the person rendering the protective service shall not recover costs, such person should bill the railroads on a proportionate basis for the loss.

The order also provided that those contracts *then on file with the Commission*, which had not been approved theretofore be, and they were thereby approved *upon the condition* that they shall be superseded by new contracts filed in accordance with the above regulations.[4]

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4. I.C.C. has taken no further action in the Ex Parte 137 proceedings, although, in March, 1963, the owning and contracting lines of the American Refrigerator Transit Co., a car-line company, petitioned the Commission for clarification and/or modification of the 1962 order requesting, essentially, answers to two questions: (1) does the 1962 order mean that the furnishing of mechanical refrigerator units is a protective service within section 1(14)(b), and (2) does the 1962 order mean that Division Sheet 7 is not in compliance with the order and must be superseded. The Commission denied the petition for the stated reason that sufficient grounds for review of the order were not presented also, shortly after the filing

PFE alleges that since 1962 it has repeatedly sought such contracts but that defendants have failed and refused to so contract or to pay PFE its costs incurred in the supplying of mechanical protective service.[4a]

PFE contends that defendants' failure and refusal to enter into such contracts for the supplying of mechanical protective service, and to obtain I.C.C. approval thereof, is a violation of Section 16(7) and Section 1(14)(b).

Section 16(7) provides that it shall be the duty of every common carrier to observe and comply with orders of the Commission; Section 1(14)(b) makes it unlawful for any common carrier to make any arrangement for the furnishing of protective service against heat or cold unless and until such arrangement has been submitted to and approved by the Commission as just, reasonable and in the public interest.[5]

It is upon this statutory basis that PFE seeks damages from 1964, together with interest thereon, attorneys' fees and costs.

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of the instant action in 1965, PFE's parent companies petitioned I.C.C. for a cease and desist order directing defendants to pay their share of PFE's costs as directed by the 1962 order; the petition raised contentions identical to those raised herein by PFE, but the I.C.C. denied the petition for the stated reason that the basic issue was substantially the same as that in this present action.

4a. An affidavit of the Secretary of the I.C.C. states: ". . . that after diligent search none of the parties defendant in the above-entitled matter have submitted contracts for rail protective services with the Pacific Fruit Express Company as required by the Commission decision in *Ex Parte 137, Contracts for Protective Services,* 318 I.C.C. III (1962)."

5. Apart from the violations of Sec. 1(14)(b) and 16(7), PFE also asserts defendants have violated Sec. 1(4). Under this provision, defendants have a duty "to provide and furnish transportation," and 49 U.C.C. Sec. 1(3)(a) (Section 1(3)(a) of the Act), includes "protective service" as part of "transportation." Section 1(4) also requires defendants to provide, in connection with their through routes, "reasonable facilities for the operation of such routes" and "reasonable compensation" for those who provide such facilities as mechanical protective service.

PFE also contends that under the circumstances appearing from the record herein, defendants are liable to it on a quantum meruit theory for the reasonable value of the mechanical protective service it has furnished to defendants—measured by the same standard of damages it asserts in connection with liability premised upon violations of the Interstate Commerce Act.[6]

DEFENDANTS' CONTENTIONS

Defendants have contended in this suit (1) that the activities of PFE do not constitute the furnishing of mechanical protective service to defendants as that term was used in law and in the I.C.C. order of August 27, 1962; (2) that, since the I.C.C. temporarily approved the already mentioned Division Sheet 7, along with other then existing contractual arrangements, Division Sheet 7 is still the only contractual arrangement between PFE and the railroads and remains so until I.C.C. makes an explicit order disapproving that arrangement as not fulfilling the requirements of Section 1(14)(b); (3) that in any event the order

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6. In support of this theory of suit PFE relies on Section 1 of the Restatement of Restitution ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other"), and *Baltimore & O.R.Co. v. New York, N.H. & H.R.Co.*, 196 F.Supp. 724 (D.Ct. N.Y. (1961) where the court held that the owners of railroad equipment (freight cars) were entitled to reasonable compensation from the users of that equipment, based on the cost of ownership, on a quantum meruit basis, saying: ". . . Plaintiffs are entitled to attempt to collect the rate established as reasonable and, if declared unreasonable, to be made whole on a quantum meruit basis. . . ." (196 F.Supp. at 736). In *Chicago, B. & O. R. Co. v. New York S. & Western R. Co.*, 332 I.C.C. 176 (1969), *aff'd* 396 U.S. 27, the Interstate Commerce Commission, pursuant to the reference of the New York District Court in *Baltimore & O. R. Co. v. New York, N. H. & H. R. Co.*, supra, determined that the per diem rates charged in the past had been unreasonable, and established reasonable rates for such periods, which rates were then adopted by the New York District Court as reasonable rates based on quantum meruit for each year in the past.

of August 27, 1962 is not self-executing and did not give to PFE any substantive right to directly recover its alleged losses from the defendant railroads since such right would arise only from such contracts as might be actually entered into between PFE and the respective railroads; (4) that the order of August 17, 1962 is vague and ambiguous.

After having considered the record herein, and after having held hearings on the evidentiary material presented by the parties in support of or in opposition to the respective motions for summary judgment, and having received oral argument and briefs thereon, this court concluded that the issues raised questions concerning the I.C.C. order of August 27, 1962 and that, therefore, no rulings or further proceedings in this suit should be made or taken pending a referral of certain questions to the I.C.C., the agency having primary jurisdiction in this matter and special expertise with respect thereto, for the further assurance of this court in making its own findings and conclusions. See, *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391, 412-13 (N.D.Ca. 1966) citing *United States v. Western Pac.R. Co.*, 352 U.S. 59 (1956), and *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940). The court made such referral by its orders of November 6, 1971 and January 20, 1972.

The court's questions were directed to the issues raised by the parties as hereinabove summarized; the I.C.C. by its Declaratory Order of February 28, 1972, Docket No. 35515, *Contracts—Protective Service Between Pacific Fruit Express Company and The Akron, Canton & Youngstown Railroad Company, et al.*, (340 I.C.C. 754), answered these questions. (Marked as Court's Exhibit A in this suit and hereby referred to and by such reference made a part hereof).

RE PROTECTIVE SERVICES

Concerning whether PFE activities constituted "protective services" within the meaning of its order, I.C.C. answered affirmatively to the effect that the activities of PFE in preparing, furnishing and servicing mechanical refrigeration units in PFE mechanical refrigerator cars to the defendants constitutes "protective service" within the purview of Sec. 1(14)(b); further, that the supplying of such mechanical protective service to the defendants by PFE was required to be covered by contractual arrangements submitted to I.C.C. for approval and that I.C.C. in its order of August 27, 1962, so contemplated. (See Answers to Court's Questions A, B, C, G, also N, O, P, Q, R and T—I.C.C. Declaratory Order of February 28, 1972, pp. 766-768; 770-774).

The court accepts the I.C.C.'s finding. This question, involving the meaning of a technical term in the transportation field is peculiarly within the special competence and expertise of the I.C.C. and its finding and conclusions, considered by this court to be fully supported by the record herein, is hereby adopted as the court's own finding and conclusion. See, *El Dorado Oil Works v. United States,* 328 U.S. 12, 19-21 (1946); *General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U.S. 422, 432-33 (1940); *Swayne & Hoyt, Ltd. v. United States,* 300 U.S. 297, 303-04 (1937); *Interstate Commerce Comm'n v. Martin Brothers Box Co.,* 219 F.2d 811, 813 (9th Cir. 1955); cert. den. 350 U.S. 823 (1955). Further, the court finds upon the record herein that there is no genuine issue of fact concerning that issue and that plaintiff is entitled to a summary judgment thereon as a matter of law.

RE DIVISION SHEET 7

With respect to the question whether Division Sheet 7 should be deemed still in effect between PFE and the railroads, it will be noted that the I.C.C. order provided that "those contracts *now on file with the Commission*, which have not been approved heretofore, be, and they are hereby approved upon the condition that they shall be superseded by new contracts filed in accord with the above regulation. . . ." (emphasis added)

The I.C.C. has answered that Division Sheet 7, although before it for informational purposes, was not one of the contracts officially "on file" with it at the time of its August 27, 1962 order. See, Answers to Court's Questions B and S — I.C.C. Declaratory Order of February 28, 1962, pp. 766, 772. This finding of the I.C.C., involving its own records, is likewise within its special competence and the court, finding it to be consistent with and supported by the record herein, adopts that finding as the court's own finding. It is clear, therefore, that Division Sheet 7 was not among the contracts that were temporarily approved by the I.C.C.

However, although Division Sheet 7 was not among the contracts falling within the temporary approval provision of the order, it was, nevertheless, as the I.C.C. has stated, in Answers to Court's Questions B and S, supra, "specifically embraced in the terms of that order" as one of the contractual arrangements that was to be superseded as required by the order.

Even if we assume that Division Sheet 7 was on file with the I.C.C. and was among the contracts conditionally approved by it for a temporary 120 day period following the service of the 1962 order, the defendants failed to file any new or superseding contracts as required by the last paragraph of the Commission's 1962 order which clearly stated

that such contracts were approved only *upon the condition* that they were to be superseded by new contracts filed in accord with the order.

RE BASIS OF PLAINTIFFS' RIGHT OF ACTION

With respect to the issue whether the 1962 order affords a basis for direct recovery by PFE in this court of damages for its alleged losses, we may assume that neither the I.C.C. order, itself, nor Section 1(14)(b) is self-executing. However, PFE is not seeking in this suit to recover on that theory. Instead, PFE premises its right to recover damages upon its statutory right to sue under, and defendants' statutory liability under, Sections 8 and 9 in that the defendants have omitted to do what was required of them by Secs. 1(14)(b) and 16(7), i.e., enter into new or superseding contracts for the provision of mechanical protective service as required by the Commission's 1962 order.

Although the I.C.C. order of August 27, 1962, did not, itself, operate to invalidate, terminate or rescind any pre-existing contracts upon failure of the railroads to file new superseding contracts within the time and in the manner required by the order, (See Answer to Court's Question H, p. 769), the order was, as indicated in Answer to Court's Question J, p. 769, clearly "binding upon the carriers to comply therewith and failure to do so would subject them to enforcement action by the Commission."

The order was such that the failure or refusal of the railroads to file such new, superseding contracts in place of existing contracts, including Division Sheet 7, was a violation of Sec. 1(14)(b) and of the order itself. (Answer to Court's Question I, p. 769). In other words, although the I.C.C. order, requiring intermediate and terminal railroads to enter into such contracts did not, *itself*, constitute a contract between the parties in the sense that the order, itself,

conferred substantive rights on car-line companies, like PFE, to recover their losses, (Answer to Question J, p. 769), the I.C.C. order was such that such a right to recover those losses would arise *either* "from the contracts required by the Commission's order" if and when entered into, "*or* by other means"—such other means obviously being action taken under either Sec. 16(12) or under Secs. 8 and 9, giving a right of action for injunctive and/or damage relief to persons injured by the failure or refusal of a railroad to comply with an order of the I.C.C. (See Answers to Court's Questions H, I and J, also K, L, M, N,—I.C.C. Declaratory Order of February 28, 1962, pp. 766-768).

Further, although the provision of the I.C.C. order of August 27, 1962, to the effect that car-lines, like PFE, were to bill, on a proportionate basis, the railroads on whose lines the mechanical service was rendered, was not self-executing and did not, itself, confer any substantive right on PFE, the I.C.C. order did require that such a provision was to be included in the new, superseding contracts into which the railroads were ordered to enter and the I.C.C. did contemplate that each participating railroad would be billed, on a proportionate basis, by car-line companies, like PFE, "*as provided in the contracts* to be filed with the Commission." (See Answers to Court's Questions D, E, F, —I.C.C. Declaratory Order of February 28, 1972, pp. 767-768).

RE VAGUENESS AND AMBIGUITY

Defendants also argue that the I.C.C.'s order is vague and ambiguous and therefore unreasonable, as various terms are not defined, including particularly the term "cost." In the first place, the Commission's 1962 order is presumed to be valid. *B & O.R. Co. v. United States*, 304 U. S. 58 (1938); *Toye Bros. Yellow Cab Co. v. Irby*, 305 F.Supp. 905, 907 (D.Ct. La. 1969); *Braswell Motor Freight*,

Inc. v. United States, 297 F.Supp. 215, 218 (D.Ct. Miss. 1969); *United States v. Southern Ry. Co.*, 364 F.2d 86, 91 (5th Cir. 1966).

Further, collateral attack on a decision of the Interstate Commerce Commission is precluded by 28 U.S.C. Sec. 2321, which provides that any action to "suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission . . ." must be brought pursuant to 28 U.S.C. Secs. 2321-25 which in turn prescribes that an injunction restraining the operation or execution of an I.C.C. order shall not be granted except by a three-judge federal court convened under 28 U.S.C. Sec. 2284. No other type of suit attacking a Commission decision directly or indirectly, is permitted. *B. F. Goodrich Co. v. Northwest Industries*, 424 F.2d 1349 (3d Cir. 1970); *Toye Bros. Yellow Cab Co. v. Irby*, 437 F.2d 806, 810 (5th Cir. 1971); *REA Express v. Alabama Great So. R.R. Co.*, 343 F.Supp. 851 (D. Ct. N. Y. 1972); *United States v. Southern Ry. Co.*, 380 F. 2d 49, 53-55 (4th Cir. 1957); *United States v. Southern Ry. Co.*, 364 F.2d 86, 91-93 (5th Cir. 1955); cert. den. 386 U.S. 1031.

Finally, it will be noted that the order does not merely order that new or superseding contracts be submitted by the railroads; it goes further to prescribe the provisions with which the contracts are to conform in substance and, with respect to "cost," prescribes in Par. d(i)(ii) the matters to be included in the determination of cost.

This court is satisfied that the I.C.C.'s order is not vague or ambiguous; that it is sufficiently clear to apprise defendants of that which is required of them. See, e.g., *United States v. Southern Railway Co.*, 364 F.2d 86, at 95-96 (5th Cir. 1966).[7]

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7. It is apparent that the words "cost" and "costs" of protective service are "words of art" in the protective service field, as they

CONCLUSIONS ON ISSUE OF LIABILITY FOR DAMAGES

For the foregoing reasons the court finds that defendants and each of them have failed and refused since 1962 to comply with the I.C.C. order of August 27, 1962 in that they have failed and refused to enter into or to submit to I.C.C. for approval on or before 120 days after the effective date of said order (which time was extended by the I.C.C. to June 10, 1963), new or superseding contracts, either with PFE or expressly for its benefit, covering protective services performed and rendered to them or in their behalf by plaintiff; that said failure and refusal is a violation of said order and of the law within the meaning of Sections 8 and 9.

Said issue has been presented and argued by the parties upon the theory that there are no genuine issues as to any material fact—only disagreement on matters of law pertaining to the rights and liabilities of the parties stemming from the I.C.C. order of August 27, 1962.[8] The court agrees and concludes from the record that plaintiff is entitled as a matter of law, pursuant to Sections 8 and 9 and Sections 16(7) and 1(14)(b), (and upon quantum meruit as an additional basis of action) to a judgment in its favor on

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have been used for over 30 years by the Commission in Ex Parte 137 proceedings alone. See references to these terms, in connection with car-line cost, in the following Ex Parte 137 decisions: 246 I.C.C. 145, 155 (1941); 253 I.C.C. 21, 22 (1942); 255 I.C.C. 729, 732 (1943); 256 I.C.C. 454 (1943); 272 I.C.C. 243, 253 (1948); 276 I.C.C. 323, 324-25 (1949); 268 I.C.C. 531, 534 (1950). Indeed, some of the defendant railroads have filed contracts with the Commission containing general provisions to the effect that mechanical protective services are to be performed at "cost," and have apparently been able to ascertain their responsibilities under the Commission's orders in Ex Parte 137 proceedings. (See, Ex Parte 137, 321 I.C.C. 758, 759 (1963).

8. Defendants have conceded on the record that there are no factual issues before the court. (See, Rep. Tr. May 9, 1972, p. 45).

the issue of the liability of the defendant railroads to it for damages occurring since January 1, 1964—essentially the difference between the amount plaintiff has been paid under said Division Sheet 7 arrangement, or otherwise, and the amount which plaintiff would have received if said defendants had complied with said order by contracting with plaintiff, or among themselves for plaintiff's express benefit, as required by said I.C.C. order of August 27, 1962 —together with interest, attorneys' fees and costs of suit.

The court reserves power to make such further orders as may be necessary to determine the issue of the amount of said damages, interest and attorney fees.

RE INJUNCTIVE RELIEF

PFE also seeks an injunction, pursuant to Section 16(12), enjoining defendants from further failure or refusal to comply with the I.C.C. order of August 27, 1962, and ordering the respective defendants to enter into contracts with PFE or among themselves expressly for its benefit, in the manner prescribed by said order and to file such contracts with I.C.C. for its approval. The United States and intervenor I.C.C. join in the PFE motion for such injunctive relief.

Section 16(12) provides that the I.C.C. may apply to District Court for injunction or other proper process to enforce its orders; that section also provides that any party injured may apply to District Court for the enforcement of such an order and the court may enforce obedience by injunction or other proper process.

Defendants' failure and refusal to comply with an I.C.C. order issued for the benefit of car-lines, such as PFE, is sufficient to constitute PFE a party injured; also I.C.C. which has joined in the PFE motion as an intervenor would itself be entitled to such injunctive relief under Sec. 16(12).

Since, as already concluded, there is no genuine issue as to any material fact and since it appears that plaintiff is also entitled to judgment in the form of injunctive relief as a matter of law pursuant to Sec. 16(12) the court concludes that defendant railroads and each of them, and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, should be, and they are hereby enjoined from continuing to fail, neglect or refuse to comply with that certain order of the I.C.C. dated August 27, 1962, and, further, shall, within 60 days from the date of this order, or within such further time as the court may hereafter order, obey said order by forthwith entering into good faith negotiations with plaintiff and entering within such period, into new, superseding contracts with plaintiff, or among themselves expressly for the benefit of plaintiff, to be effective January 1, 1973, (the beginning of PFE's annual accounting period) covering protective services heretofore or now being performed under the provisions of Division Sheet 7, or any other existing contract—said new, superseding contracts to conform in substance with the provisions of subsections (b), (c), (d), (e), (f) and (g) of said I.C.C. order of August 27, 1962—and, within said period, submit said new, superseding contracts to I.C.C. for approval under Sec. 1(14)(b) and Sec. 16(7)—at defendants' expense and diligently prosecute said submission to the end that approval of said contracts may be obtained as soon as possible.

It is further ordered that, if such new superseding contracts have not been submitted to I.C.C. within the period herein fixed on account of failure of the parties to agree upon the form or content of such contracts, the parties

shall, within 20 days from the expiration of said initial 60 day period, petition I.C.C. for its approval or disapproval of such provisions as to which said parties do agree and also for approval, disapproval or modification of such further provisions, proposed by either party, as to which the parties cannot agree and for such further instructions or further orders as I.C.C. may deem necessary concerning the form or content of such contracts as are herein ordered consistent with its previous orders of August 27, 1962, February 28, 1972 and this order. The court desires that such I.C.C. consideration, if required, take place as expeditiously as possible.

The court reserves power to supervise, modify or separately formalize the injunctive provisions of this order, and to enforce the same, but compliance with the above procedure, and with any I.C.C. order made as a result thereof and consistent with the I.C.C. previous orders of August 27, 1962, February 28, 1972 and this order, shall be deemed compliance to that extent with this order and, likewise, failure or refusal of any party to follow such procedure shall be deemed to that extent a non-compliance with this order.

On the expiration of the 60 day period above fixed, or the expiration of such extension thereof, as may be hereafter made, the parties shall jointly or separately report to this court upon the progress of compliance with the injunctive order herein made.

This memorandum constitutes the findings and conclusions of the court to the extent that such findings and conclusions may be necessary.

Dated: March 2, 1973.

/s/ W. T. SWEIGERT
W. T. Sweigert
United States District Judge

Appendix D

Amended Opinion of Court of Appeals for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

No. 73-2184

Pacific Fruit Express Company,
Plaintiff-Appellee,

Interstate Commerce Commission &
United States of America,
Intervening Plaintiffs-Appellees,

vs.

Akron, Canton & Youngstown Railroad Company, et al.,
Defendants-Appellants.

AMENDED OPINION

[August 28, 1975]

Appeal from the United States District Court
for the Northern District of California

Before: KOELSCH and CHOY, Circuit Judges, and KELLEHER,* District Judge.

KELLEHER, District Judge:

Appellee Pacific Fruit Express Company ("PFE") brought in the District Court an action for damages under

*Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

49 U.S.C. §§ 8 and 9 and for injunctive relief under 49 U.S.C. § 16(12)[1] against 90 Mid-Eastern, Eastern, and Southern railroad common carriers for alleged continuing violation of a 1962 order of the Interstate Commerce Commission ("ICC"). The District Court granted the motion of PFE for summary judgment on the liability issue and the motion of PFE and of the intervenor, ICC, for injunctive relief.

This appeal was taken by 56 of the defendant railroads, invoking the jurisdiction conferred by 28 U.S.C. § 1291. The judgment and Order[2] appealed from recited for its founda-

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1. 49 U.S.C. § 16(12):
"Proceedings to enforce orders other than for payment of money. If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

2. The operative portions of the order are as follows:
"ORDERED, ADJUDGED AND DECREED that defendant railroads and each of them, and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, should be, and they are hereby enjoined from continuing to fail, neglect or refuse to comply with that certain order of the I.C.C. dated August 27, 1962, and, further, shall, within 60 days from the date of this order, or within such further time as the court may hereafter order, obey said order by forthwith entering into good faith negotiations with plaintiff and entering within such period, into new, superseding contracts with plaintiff, or among themselves expressly for the benefit of plaintiff, to be effective January 1, 1973 (the beginning of PFE's annual accounting period) covering protective service heretofore or

tion: (1) the prior order of the Court granting the motions of plaintiff and intervenor, ICC, for summary judgment, and (2) the conclusions of the Court as theretofore set forth in its extensive Memorandum of Decision.[3] By its Memorandum of Decision, the Court found that there was no

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now being performed under the provisions of Division Sheet 7, or any other existing contract—said new, superseding contracts to conform in substance with the provisions of subsections (b), (c), (d), (e), (f) and (g) of said I.C.C. order of August 27, 1962—and, within said period, submit said new, superseding contracts to I.C.C. for approval under Sec. 1(14) (b) and Sec. 16(7)—at defendants' expense and diligently prosecute said submission to the end that approval of said contracts may be obtained as soon as possible.

"It is further ordered that, if such new superseding contracts have not been submitted to I.C.C. within the period herein fixed on account of failure of the parties to agree upon the form or content of such contracts, the parties shall, within 20 days from the expiration of said initial 60 day period, petition I.C.C. for its approval or disapproval of such provisions as to which said parties do agree and also for approval, disapproval or modification of such further provisions, proposed by either party, as to which the parties cannot agree and for such further instructions or further orders as I.C.C. may deem necessary concerning the form or content of such contracts as are herein ordered consistent with its previous orders of August 27, 1962, February 28, 1972, and this order. The court desired that such I.C.C. consideration, if required, take place as expeditiously as possible.

"The court reserves power to supervise the injunctive provisions of this order, and to enforce the same, but compliance with the above procedure, and with any I.C.C. order made as a result thereof and consistent with the I.C.C. previous orders of August 27, 1962, February 28, 1972, and this order, shall be deemed compliance to that extent with this order, and, likewise, failure or refusal of any party to follow such procedure shall be deemed to that extent a noncompliance with this order.

"On the expiration of the 60 day period above fixed, or the expiration of such extension thereof, as may be hereafter made, the parties shall jointly or separately report to this court upon the progress of compliance with the injunctive order herein made."

3. *Pacific Fruit Express Co. v. Akron, Canton & Youngstown R. Co.*, 355 F.Supp. 700 (N.D.Cal. 1973).

genuine issue as to any material fact and upon what it deemed the undisputed material facts granted the injunctive relief requested.

I

PFE, a car-line company wholly owned by the Union Pacific Railroad Company and Southern Pacific Transportation Company is engaged in the business of furnishing to railroads refrigerated units and supplying Mechanical Protective Service ("MPS") for perishable commodities against heat and cold.

The use of PFE cars on appellants' lines is occasioned by the fact that Union Pacific and Southern Pacific, as originating carriers on eastbound shipments, select these PFE cars to transport perishables to the East. Appellant railroads as common carriers are required by law to accept, and do accept, such cars at interchange points to transport perishables over their respective lines to ultimate destinations. The mechanical units in the refrigerated cars are used by appellants to supply MPS.

These units are designed to furnish complete continuous protection to perishables on all railroads over which the refrigerator car moves. Both PFE's parent carriers and appellants are parties to joint tariffs which cover the movement of perishables over their respective lines. These tariffs provide for a charge to the shippers for the movement of the commodity and a separate charge for protective service. The protective service charges are divided among all the carriers in the line haul movement in accordance with Division Sheet 7.[4]

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4. As stated by the District Court in its Memorandum of Decision, 355 F.Supp. at 703, n.1:

> "This Division Sheet 7 is an arrangement among the railroads themselves, issued by their National Perishable Freight Committee as agent for substantially all railroads. Under its

By its District Court action, PFE sought a mandatory injunction under 49 U.S.C. § 16(12) to require appellant railroads to comply with an order of the ICC entered August 27, 1962. *Ex Parte No. 137, Contracts for Protective Services*, 318 I.C.C. 111 (1962). The 1962 ICC order in part required all rail carriers to submit to the ICC for its approval within a specified time new contracts for the supply of MPS. PFE also sought by its action damages under 49 U.S.C. §§ 8 and 9 in excess of 12.5 million dollars—essentially the difference between the appellant railroads' payments to PFE for MPS under pre-1962 ICC order contracts and the amount PFE would have received had new contracts been entered into pursuant to the 1962 ICC order.

The 1962 ICC order provides in part:

> "(a) All rail carriers and express companies receiving protective services under any contracts, agreements, or arrangements requiring approval under section 1(14)(b) of the Interstate Commerce Act *shall submit for approval, on or before 120 days after the effective date of this order, new or superseding contracts covering protective services performed under contracts now on file with the Commission as well as those performed under the provisions of Division Sheet 7.... The contracts required herein to be filed shall supersede all prior contracts, including Division Sheet 7*, and such contracts and those filed thereafter shall conform in substance to the provisions set forth in subsections (b), (c), (d), (e), (f), and (g).

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provisions, 80 percent of the revenue collected by the railroads under their respective tariffs for mechanical protective service are paid by the participating railroads to the railroad initially handling the shipment, which percentage is in turn paid over to the car owner, like PFE, for the mechanical refrigeration units in its cars. The remaining 20 percent of the tariff revenue is divided among all the railroads participating in the particular shipment. This is the basis on which PFE has been compensated."

> "*It is further ordered*, That those contracts now on file with the Commission which have not been approved heretofore, be, and they are hereby approved *upon the condition* that they shall be superseded by new contracts filed in accord with the above regulations." 318 I.C.C. at 138. (Emphasis added.)

We note that the Judgment and Order appealed from granted only the injunctive relief sought, the Court by its Memorandum of Decision having expressly reserved to later proceedings determination of the issue of damages.

After the action was filed in the District Court, the railroads sought a stay of the proceedings, claiming that the subject matter was within the primary jurisdiction of ICC. Thereafter, the District Court submitted questions, formulated with the assistance of all parties concerned, to the ICC requesting a clarification and interpretation of its 1962 order.

Following the answers by the ICC,[5] which the District Court later adopted as part of its findings when it granted summary judgment, the United States, as a statutory defendant pursuant to 28 U.S.C. § 2322, with respect to the injunction count, was realigned and became a party plaintiff. Thereafter, as noted above, ICC sought and was allowed to intervene as a party plaintiff with respect to the injunctive relief sought.

II

The appeal raises the following issues:

1. Did the District Court commit error in granting summary judgment?

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5. See the ICC's Declaratory Order of February 28, 1972, *Contracts—Protective Service Between Pacific Fruit Express Company and The Akron, Canton & Youngstown Railroad Company, et al.*, 340 I.C.C. 754 (1972).

2. Was there on the part of the plaintiff PFE under the 1962 order of the ICC a substantive right enforceable in the District Court?

3. Was there such a relationship between the railroads and PFE as to permit District Court enforcement under 49 U.S.C. § 1(14)(b), absent a contractual right between the parties.

4. Was the 1972 order of the ICC issued in violation of the Administrative Procedure Act, and hence unenforceable by the District Court?

5. Were the mandatory injunction portions of the District Court's order in excess of its powers under the law?

Each of the foregoing issues was considered by the District Court and, we think, rightly decided. Accordingly, and for the reasons more particularly hereafter set forth, we affirm the order and judgment of the Court below.

III

In reviewing the grant of summary judgment, we apply the same rule that is initially applied by the trial court under Rule 56(c), Federal Rules of Civil Procedure.[6] *Soria, et al. v. Oxnard School District Board of Trustees*, 488 F.2d 579, 586 (9th Cir. 1973); *Caplan v. Roberts*, 506 F.2d 1039, 1042 (9th Cir. 1974). The rule is simply stated: "Summary judgment is 'proper only where there is no genuine issue of any material fact or where viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law.'" 506 F.2d at 1042.

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6. Rule 56(c), F.R.C.P., provides, in pertinent part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

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In arguing that the District Court erred in granting summary judgment, appellants contend that the record below presented two genuine issues of fact: (1) What was the status of Division Sheet 7, viz., had it or had it not been filed with, and approved as a contract, by the ICC? (2) Was PFE a "party injured" who could sue for an injunction under the provision of Section 16(12) of the Interstate Commerce Act?[7]

It appears that the record before the ICC was ambiguous as to whether Division Sheet 7 was on file before the Commission and as to whether the sheet was a contract approved by the Commission. But the Commission's finding as expressed in answer to one of the District Court's questions was that Division Sheet 7 was not on file before it and hence was not approved by it. The Court below adopted that finding as one within the special competence of the ICC and as not presenting a factual dispute before the Court. Furthermore, the District Court found that even if Division Sheet 7 was on file and approved by the Commission, it was a contract which was required under the 1962 order to be superseded by a new contract filed in accordance with the order, and since the railroads had failed to meet that obligation to file such new contract, there was a violation of the order. We think that the Court was correct, for even under the adjunct to the summary judgment rule, requiring that the evidence and the inferences which may be drawn therefrom be viewed in the light most favorable to the adverse party, see *Caplan v. Roberts, supra,* there was here presented no genuine issue of fact.

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7. It should be noted that the District Court considered that defendants had conceded on the record that there were no factual issues before the Court. 355 F.Supp. at 708, n.8. We view the matter in light of their contention on appeal that no such concession was made.

Similarly with respect to appellants' contention that a material issue of fact is presented as to whether PFE was a "party injured," the Court below had a record on which no material dispute existed with regard to the injurious consequences to PFE by reason of the failure of the appellants to enter into the negotiations for a new and superseding contract. The ICC order created an obligation on the part of appellants to negotiate new contracts. Also, it is undisputed on the record that the railroads failed over many years to perform this obligation. Thus, the only factual question presented as to whether PFE was an injured party relates to the question of *how much* injury and consequential damage was suffered. The issue as to quantum of damages was reserved by the Court below for future proceedings, to wit, a separate trial on the issue of damages. This being so, the Court below had no need to concern itself with the question of damages, or indeed whether there was a factual dispute concerning the nature and extent of the damages suffered by appellee. Clearly, therefore, as a matter of law, there was no genuine issue of fact to be resolved, and summary judgment was wholly proper.

There is no substance to appellants' contention that somehow PFE had no substantive right enforceable in the District Court by reason of the 1962 order of ICC and that hence no right to injunctive relief was obtainable under § 16(12) of the Act. The contention appears to be that the 1962 order conferred no substantive right on PFE for the direct payment of money, which is correct. But that is not to say that the right under the order to have the railroads enter into contract negotiations, a result of which would provide perhaps for more favorable rights to obtain money, is not in itself a substantive right subject to enforcement in the District Court under § 16(12) of the Act. The very

ground of the complaint to which the 1962 order addressed itself was the refusal of the railroads to do that which they should have done, to wit, enter into new contracts, the consequences of which would have been to provide for the payment of money by the railroads to PFE. Clearly, the deprivation of the right to a contract which the order compelled was sufficient in itself to be regarded as a "substantive right." See *New York, Susquehanna & Western R. Co. v. Penn. Central Co.,* 287 F. Supp. 704 (S.D.N.Y. 1968). Moreover, whether PFE was injured or not, there is no statutory requirement that ICC which joined in the motion, show injury. *United States v. City of Jackson,* 318 F.2d 1 (5th Cir. 1963).

This issue last dealt with is in some sense intertwined with the further contention made by appellants that, there being no contractual rights between the parties, there is no such relationship as is necessary under 49 U.S.C. § 1(14)(b) to invoke the power of the District Court to enforce the rights. We are satisfied that the effect of the ICC order, whether it established a contractual relationship, or merely ordered that a contractual relationship be entered into, has the effect of placing the parties in such relationship to one another as to permit enforcement under § 16(12).

There is no merit to appellants' contention that there was in some manner a failure to comply with the requirements of the Administrative Procedure Act, or that there was in some way a failure to exhaust administrative remedies before the Commission. The Court below ordered enforcement of the 1962 order. There is no issue in the record here as to whether that order was made in full compliance with requirements of the Administrative Procedure Act for notice and hearing. By strained construction, appellants would have us regard ICC responses to the District Court

questions as constituting some new "1972 order," greater in breadth than the 1962 order, and promulgated by ICC without the requisite notice or hearing. We reject this contention, for however we characterize the ICC response of 1972, as "order" or mere response, any challenge thereto must have been made in the Court referring such question) to the ICC within 90 days from the date that the order of the ICC becomes final. 28 U.S.C. § 1336(b) and (c).[8] Appellants made no attack on these responses; indeed, they embraced with vigor, in the Court below, those responses. They are not permitted here for the first time, contrary to § 1336, to make their attack.

We find little substance and less merit to appellants' contention that the injunction was defective because it exceeded the District Court's authority. While receding not at all from its previous position that injunctive relief by way of summary judgment was wholly improper, appellants attack certain portions of the injunction as excessive. It is contended that the injunctive power of the District Court was exhausted upon the making of its order enjoining appellants from continuing failure to comply with the 1962 order. It is contended that the Court has power to enforce only that which the ICC has the power to promulgate and that the latter power is limited to the giving or withholding of ap-

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8. 28 U.S.C. § 1336(b) and (c) states:

"(b) When a District Court or the Court of Claims refers a question or issue to the Intertate Commerce Commission for determination, *the court which referred the question or issues shall have exclusive jurisdiction* of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral."

"(c) Any action brought under subsection (b) of this section shall be filed *within 90 days* from the date that the order of the Interstate Commerce Commission becomes final." (Emphasis added.)

proval of protective service contracts when filed. It is said that § 1(14)(b) does not grant to ICC any compulsory power to make parties enter into contracts, and particularly that power is lacking on the part of the ICC to dictate that any protective service contract be entered on a retroactive basis. We consider this argument specious. In the face of the record here, we find that the ICC's 1962 order was within its power to promulgate and that the District Court, pursuant to the broad power to compel obedience under § 16 (12), was within its jurisdiction and had the power to mandate compliance with that order.

JUDGMENT AFFIRMED.

Appendix E

Report and Order of the Interstate Commerce Commission of February 28, 1972

Served March 8, 1972

Interstate Commerce Commission

No. 35515

CONTRACTS—PROTECTIVE SERVICE BETWEEN PACIFIC FRUIT EXPRESS COMPANY AND THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Decided February 28, 1972

Declaratory order entered upon referral of certain questions by United States District Court for the Northern District of California.

No appearances.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS WALRATH, JACKSON, AND BREWER

JACKSON, *Commissioner:*

By order entered on November 16, 1971, and received on November 22, 1971, the United States District Court for the Northern District of California, in relation to its pending docket No. 44601, Pacific Fruit Express Company v. Akron, Canton & Youngstown Railroad Company, et al., referred certain issues and questions to the Commission for determination as being within our primary jurisdiction. By order of January 20, 1972, the court referred additional issues and questions to the Commission. This proceeding is hereby

instituted *sua sponte* to respond. The court originally requested an opinion within 60 days of the receipt of its order but by order dated December 14, 1971, extended the time to February 15, 1972. The court's order of January 20, 1972, further extended the time for the Commission's determination to March 15, 1972. Consequently due and timely execution of our functions requires the omission of an examiner's report and recommended order.

The court's orders contain the factual basis supplied by the parties upon which it requests an opinion with respect to the question. In view of the circumstances, our responses to the questions posed should not be considered as having application to any situation except that before the court. The following is a reproduction of portions of the court's orders.[1]

STATEMENT OF THE NATURE OF THE PENDING CASE AND THE CONTENTIONS OF THE PARTIES

Pacific Fruit Express Company (hereinafter called PFE) by its motion for summary judgment asks the Court at present for a determination only of the issue of liability, that the defendants are liable to it in proportion to their use for mechanical protective service furnished by PFE to the defendants since 1964 by means of mechanical refrigeration units in PFE mechanical refrigerator cars. The bases of the action are that the defendants have failed to pay the plaintiff these amounts, in violation of an Order of the Interstate Commerce Commission, dated August 27, 1962, in Ex Parte 137, *Contracts for Protective Services*, and that, irrespective of this Order, plaintiff is entitled to re-

1. Paragraphs numbered 16-21 hereinafter set forth are reproduced from the court's order of January 20, 1972, but have been renumbered for purposes of continuity in this report.

cover in *quantum meruit* for the reasonable value of mechanical protective service furnished each defendant.

Defendants by their answers have denied the charging allegations of the complaint of PFE and the existence of any indebtedness to PFE. In addition by their answers defendants have raised a number of affirmative defenses, including (1) a specific denial of any violation of Section 1 (14)(b) of the Interstate Commerce Act or any other provision of law and (2) the affirmative allegation that the subject matter of the action is within the jurisdiction of the Interstate Commerce Commission.

Following the filing of the motion for summary judgment by PFE, defendants filed motions (1) for dismissal of the action on the ground that its subject matter was within the exclusive jurisdiction of the Commission and (2) for a stay of further proceedings in the action so that its subject matter could be referred to the Commission on the ground that subject matter was within the primary jurisdiction of the Commission.

In support of its motion for summary judgment on the liability issue PFE filed affidavits containing factual matters, together with supporting memoranda containing legal arguments. In opposition to the motion for summary judgment of PFE, defendants filed affidavits setting forth factual matters and opposing memoranda embodying legal arguments.

The recitals of facts and contentions set forth * * * have been proposed by the parties. Such recitals and contentions are included * * * for the purpose of informing the Interstate Commerce Commission of the issues involved in this action and of the contentions of the parties. Such recitals and contentions are not intended to constitute findings of fact or conclusions of law of the Court. As of now the

Court has made no determinations in this action other than to order that further proceedings in this action be stayed pending receipt from the Commission of responses to the questions directed to it * * *.

For present purposes, the following facts and contentions pertaining to the past and present are pertinent to the issues raised by the parties:

1. PFE operates through ownership or lease, a large number of mechanical refrigerator cars, each of which contains a mechanical refrigeration unit.

2. The defendants use these cars to transport perishables over their lines of railroad, and the units are used by them to supply mechanical protective service to these perishables.

A majority of the cars are initially furnished by PFE to railroads in the West, including its owners, Southern Pacific Transportation Company, and Union Pacific Railroad Company, who each own 50 percent of the stock of PFE and, prior to July 1, 1967, to the Western Pacific Railroad Company. A significant number of perishable shipments are also originated in PFE mechanical refrigerator cars by the defendants themselves, and many of these shipments do not move over the lines of either Southern Pacific or Union Pacific. PFE contends it also furnishes mechanical protective service to defendants during these movements.

3. Each railroad named in the shipper's routing in the bill of lading has a legal duty, under the Interstate Commerce Act, to accept cars in interchange from a delivering railroad, and each has a legal duty to deliver the cars to the next railroad named in the routing.

4. Defendants' use of PFE's equipment (i.e., the mechanical refrigerator cars and the mechanical refrigeration units) is substantial, aggregating hundreds of thousands of days and millions of miles on defendants' lines of railroad

collectively. Defendants for many years have paid PFE their proportionate parts of PFE's costs of ownership and operation of mechanical refrigerator cars (excluding the mechanical refrigeration units), in accordance with the provisions of Mileage Tariff No. 7. However, such costs, and the payments made by the defendants, do not compensate PFE for any of its costs of ownership and operation of the mechanical refrigeration units.

5. Defendants have adopted National Perishable Freight Committee's Circular 20-F, the "Code of Rules for Handling Perishable Freight." Under this Circular it is the responsibility of a railroad delivering a mechanical refrigerator car to another railroad to inspect the mechanical refrigeration unit; to make necessary repairs; and to add diesel fuel to the engine, and refrigerant, if necessary. If a railroad makes repairs and adds fuel or refrigerant, it bills PFE, and PFE pays the railroad at an agreed rate, in accordance with the provisions of this Circular and Division Sheet 7.

6. Plaintiff's books of account are kept in accordance with accounting classifications and rules prescribed by the Interstate Commerce Commission.

7. During the years 1964 to date, the defendants have collectively agreed between themselves to pay, and have paid PFE for mechanical protective service in accordance with the provisions of Division Sheet 7, which is issued by the National Perishable Freight Committee, pursuant to the authority of substantially all railroads. Division Sheet 7 applies for the account of all lines who are parties to Perishable Protective Tariff 18 (I.C.C. No. 37), which includes the defendants.

Under Division Sheet 7, 80 percent of the mechanical protective service revenue collected by the railroads pursuant to Perishable Protective Tariff 18 is:

"* * * allowed to the car owner to cover the cost of ownership of the mechanical unit(s) and other expenses assumed by car owner."

The latter expenses include fuel and repairs.

The remaining 20 percent of the mechanical protective service revenue is divided among all carriers participating in the service on the same basis as governs the division of the joint through freight rate via the route over which the shipment moves. Division Sheet 7 also provides that the car owner is to be paid 80 percent of various other revenues received by the railroads in connection with the furnishing of mechanical protective service; that 80 percent of the detention charges collected by the defendants will be allocated to the car owner; that the car owner will receive 80 percent of the charges when the mechanical car has been placed for loading and not used by the shipper for transportation; and that the car owner will be billed by and will pay a railroad for repairs, refrigerant, antifreeze and other supplies furnished to the mechanical refrigeration unit. These amounts have been paid to PFE by defendants during the years 1964 to date, but they are less than the cost to PFE of rendering the service by sums varying from $2 to $4 million each year. After deducting the proportionate amounts of such losses which have been paid by certain railroads to PFE, including Southern Pacific Transportation Company, Union Pacific Railroad Company and (prior to July 1, 1967) Western Pacific Railroad Company, the total losses which PFE contends should be allocated to the defendant railroads have been approximately $1 to $2 million annually.

8. PFE contends that the payments it has received under Division Sheet 7 are not compensatory, and that the payments and the provisions therefor contained in Division

Sheet 7 do not comply with subparagraph (e) [49 CFR § 105.3][2] of the I.C.C.'s 1962 Order in Ex Parte No. 137, Contract for Protective Services, which states:

"In the event the person rendering the protective services shall not recover costs for any item or service rendered, such person shall bill the railroads and express companies receiving these services, on a proportionate basis, for the amount of the loss."

PFE also contends that defendants have violated the provisions of said Order which approved protective service contracts on file with the Commisison, "upon the condition that they shall be superseded by new contracts filed in accordance with the above regulations."

9. PFE's affidavits in support of its motion for summary judgment assert that it has offered, beginning in 1965, to enter into contracts or to revise Division Sheet 7 to provide that PFE would be compensated in an amount sufficient to cover its cost of providing mechanical protective service, but that defendants have refused to do so. Beginning in 1965, PFE has billed each defendant for its respective proportionate share of PFE's losses arising from the furnishing to or on behalf of said defendant of mechanical protective service, but each defendant has refused to pay PFE the amounts indicated in such bills, and has continued to pay PFE the lesser amounts resulting from application of the provisions of Division Sheet 7.

10. Defendants contend that the only service rendered to them is the furnishing of the mechanical refrigeration units in the mechanical refrigerator car, and that this activity is not "protective service" which is covered by the 1962 Order of the I.C.C. in Ex Parte 137. Defendants also contend that even if this activity is protective service, the

2. Now renumbered as 49 CFR § 1032.2(e).

Commission's Order is not self-executing. PFE's position is that when a defendant has used a PFE mechanical refrigeration unit to protect a shipment against heat or cold, PFE has thereby furnished to that defendant mechanical protective service, and that said service is rendered by PFE to that defendant, whether the latter is an originating, intermediate or terminating carrier.

11. Each of the defendants, as well as other railroads who are not defendants, including Southern Pacific and Union Pacific, are parties to joint rates and through routes for the transportation of perishables, and publish tariffs by which they thereby hold themselves out to the public to transport perishables over such through routes under joint rates.

12. Defendants contend that PFE's only legal relationship is with the origin railroad. PFE's position is that there are a number of pertinent legal relationships between PFE and each of the defendants, which exist whether a particular defendant is an origin, intermediate or terminal carrier. These include:

a. Defendants have a legal duty to furnish both transportation and protective service, and a legal duty to supply the instrumentalities to do so, under §§ 1(3)(a) and 1(4) of the Interstate Commerce Act. PFE's services and property are used by the defendants in performing these legal duties. PFE therefore asserts that an implied in law contract arises to pay the reasonable costs of such services and property (Restatement of Restitution, § 1).

b. Each defendant has promised to pay owners of mechanical refrigerator cars, and in fact, has since 1964 paid PFE mileage allowances varying from 4.35 cents to 6.3 cents per mile for each mile a PFE mechanical refrigerator car moves over its line. The defendants have done this in accordance with their "Mileage Tariff 7".

This mileage allowance is determined by the Association of American Railroads, pursuant to an Agreement among all railroads which has been approved by the Interstate Commerce Commission.

c. Legal relationships are created by Division Sheet 7. There are frequent references therein to the "car owner" who is allowed 80 percent of the "Mechanical Protective Service" revenue, and under its provisions the car owner must pay any railroad for repairs, fueling and certain other activities performed by the latter in connection with the mechanical protective service unit.

d. Legal relationships are also created by National Perishable Freight Committee Circular 20-F to which the defendants are parties. This Circular provides that notice of servicing or repairs to the unit will be sent to the car owner, e.g., PFE, by the servicing railroad (Rule 425 (A)). Under Rule 460 of this Circular the defendants also are obligated to furnish detention data reports to the car owner and PFE is specifically named in that Rule.

13. Defendants assert that they perform the servicing and fueling of mechanical refrigeration units when necessary on their lines, and that they also inspect the units. PFE points out that it must pay the defendants for their servicing and fueling activities in accordance with Division Sheet 7. PFE contends that the mechanical refrigeration units are largely self-operating. During 1969, for example, PFE contends that only about 1.7 percent of the units were repaired, and only 17 percent were refueled by all defendant lines. Over 98 percent of the PFE mechanical refrigeration units did not need repairs, and over 83 percent did not require refueling by defendant lines during this period. PFE contends that in the case of eastbound movements originating on the railroad lines of Southern Pacific and Union

Pacific, the initial servicing performed by PFE employees of mechanical refrigeration units is responsible for the unit operating substantially automatically on the lines of the defendants.

14. PFE contends that defendants, in their Perishable Protective Tariff 18, and also in their Circular 20-F, have defined "mechanical protective service" as follows:

"'Mechanical protective service' means protection furnished the lading by or through the operation of the mechanical unit in a car so equipped."

15. PFE also asserts that it has a right to recover under § 1(4) of the Interstate Commerce Act which provides that every carrier establishing through routes must "provide reasonable facilities for operating such routes", and "provide reasonable compensation to those entitled thereto." Plaintiff also asserts that it has a right to recover under common law *quantum meruit* principles, and also pursuant to § 1(14)(a) of the Interstate Commerce Act, which prescribes "reasonable compensation" for the use of equipment "whether or not owned by a carrier."

The Court is aware that the Commission, by its Order of April 4, 1963, in Ex Parte No. 137, denied a Petition for Clarification and/or Modification of the Commission's Report and Order of August 27, 1962, "for the reason that sufficient grounds have not been presented to warrant granting the action sought." The Court is also aware that by its Order of May 17, 1966, the Commission denied "without prejudice to refiling after disposition of the said Court action", a Petition filed by Southern Pacific and Union Pacific for a Cease and Desist Order. The Petition alleged that the same railroads who are defendants in this litigation were violating § 1(14)(b) of the Interstate Commerce Act and the Commission's 1962 Order in Ex Parte No. 137, and

requested that the Commission order them to cease and desist from such violations. The Petition also asked the Commission to order the respondents in that proceeding (i.e., the defendants herein) to enter into arrangements pursuant to which PFE's losses from the furnishing of mechanical protective service would be eliminated, and requiring those respondents to pay their proportionate share of PFE's losses arising from the furnishing of mechanical protective service.

The Petition also sought an order requiring the respondents therein to submit their contract arrangements to the Commission for approval pursuant to § 1(14)(b). In denying the request for a Cease and Desist Order, the Commission recited that it appeared that the basic issue raised thereby was substantially the same as that under consideration in this litigation.

* * * * * * *

16. One of the basic contentions of defendants in this action is that PFE has not furnished mechanical protective service to any of them. In support of that contention defendants advance the following detailed contentions:

(a) Generally, defendants are midwestern, eastern and southern railroads operating east of such points as Chicago, Omaha, Council Bluffs and Kansas City. Although defendant Santa Fe operates out of California, Arizona and New Mexico and some of the component lines of what is now the Burlington Northern system operate out of the Pacific Northwest, the great bulk of perishable traffic on the lines of Santa Fe moves in mechanical refrigerator cars which it owns, while the Burlington lines use carline companies which they own.

(Plaintiff contends there is no dispute as to the relative use by Santa Fe and Burlington Northern of their mechanical refrigeration units as compared to their use of PFE's

mechanical refrigeration units to supply perishable shipments moving over their lines with mechanical protective service against heat and cold. PFE contends that Santa Fe and the Burlington Northern are supplied mechanical protective service by PFE to the extent indicated in the Exhibits attached to the complaint on file in this action.)

(b) With minor exceptions, the movements of perishable commodities in PFE mechanical refrigerator cars which are involved in this action are eastbound shipments as to which Southern Pacific and Union Pacific, the parent companies of PFE, are the originating carriers and defendants are intermediate or terminating carriers. While some shipments originate on other lines, including some westbound shipments, their number is relatively insignificant as compared with the total number of shipments in PFE cars.

(Plaintiff contends that during 1969 approximately 4,800 such shipments originated on railroads other than Southern Pacific and Union Pacific, including some westbound shipments. This is about 1/20th of the total number of shipments of perishable commodities which during 1969 were protected from heat or cold by PFE mechanical refrigeration units in PFE mechanical refrigerator cars.)

(c) With insignificant exceptions relating to a few defendants, and principally at interchange points such as Council Bluffs, none of the defendants have had any contracts or agreements for mechanical protective service with PFE.

(Plaintiff contends that the latter contention is erroneous, as shown by the affidavits and counter-affidavits on file herein, and by the Court's Order of November 16, 1971 * * * (describing contractual relationships between PFE and defendants set forth in National Perishable Freight Committee's Circular 20-F), and * * * (describing various legal

relationships between PFE and the defendants created by statute, and pursuant to Mileage Tariff 7, Division Sheet 7, and Circular 20-F).)

(It is PFE's position that each and all of said documents create legal relationships between PFE and the defendants, and contracts or agreements for the furnishing to each of the defendants by PFE of mechanical protective service, through the supplying of mechanical refrigeration units which are used by defendants to protect perishable shipments against heat or cold in fulfillment of the defendants' statutory duty to do so. It is further PFE's position that, even in the absence of an express contract, implied contracts are thereby created and that PFE is thereby entitled to recover in *quantum meruit* for the reasonable value of mechanical protective service furnished each defendant.)

(d) The decision to select and use mechanical refrigerator cars of PFE in the movements of perishables involved in this action has been made by its parent companies, as originating carriers. Defendants have had no voice or part in such decision and selection. When the PFE cars are tendered to defendants, as intermediate or terminating carriers they are compelled as common carriers to accept the cars for movement over their lines, provided that the cars are in safe operating condition and the mechanical units are operating properly.

(Plaintiff contends that under the provisions of the Interstate Commerce Act, the originating carrier, whether it be one of PFE's parent companies, or one of the defendants, is required to tender the PFE mechanical refrigerator car to the connecting carrier named in the shipper's bill of lading and that the same statutory provisions require intermediate or terminating carriers to accept cars for movement over their lines. In addition, plaintiff contends

that the affidavits show that 4,800 shipments during 1969 in PFE mechanical refrigerator cars, in which the mechanical refrigeration unit furnished mechanical protective service against heat or cold to such shipments, did not originate on PFE's parents' lines. Therefore the latter could not have made the decision to select and use PFE cars with respect to such shipments, and it is not true that defendants had no voice or part in the selection and use of PFE cars as to such shipments. Moreover, the statements ignore PFE's contention that defendants use PFE mechanical refrigeration units to supply mechanical protective service (protection against heat to cold) to shipments moving over their lines in PFE mechanical refrigerator cars, in fulfillment of both their statutory duty to do so and their holding themselves out by tariff to do so, and that it is only fair, proper and equitable that they should pay either the cost thereof, pursuant to the provisions of the I.C.C.'s Order of August 27, 1962, in Ex Parte No. 137, *Contracts for Protective Services,* or that they should pay the reasonable value of the service furnished to them on the basis of *quantum meruit.* Plaintiff's position is that it makes no difference which railroad is the originating carrier of a perishable shipment requiring the use of a PFE mechanical refrigeration unit in a PFE mechanical refrigerator car to provide mechanical protective service (protection against heat or cold). The essence of PFE's causes of action is that defendants, individually and collectively, use PFE's mechanical refrigeration units to protect shipments moving over defendants' lines in plaintiff's mechanical refrigerator cars; that they reap the benefits of the use of such units; and at the same time they deny any obligation to pay PFE therefor.)

(e) While PFE mechanical refrigerator cars equipped with mechanical refrigeration units are on the lines of defendants, all required servicing in connection with the operation of the units is performed by defendants. All required inspection, starting, stopping, regulating, fueling, repairing and other servicing in connection with the operation of the units, as well as the transferring of the lading if necessary, is performed by defendants or by third party contractors or carline companies engaged by defendants. While PFE pays for the fuel, refrigerants and certain repair items, all of the other costs of required servicing are borne by defendants.

(Plaintiff PFE contends there is no dispute between the parties concerning the activities performed by PFE, on the one hand, in connection with the supplying of mechanical protective service by it, and by the defendants on the other. However, PFE asserts that defendants' description in the foregoing paragraph of the activities performed by them is inaccurate, and plaintiff therefore objects on the ground it is misleading, as it fails to recognize, as set forth in the Court's Order of November 16, 1971, *** PFE's contention that in the great majority of instances, no servicing whatsover of the PFE mechanical refrigeration units by defendants is necessary, as the initial make-ready work, repairs, and servicing is performed by PFE forces and thereafter the mechanical refrigeration units are largely self-operating, and that any servicing performed by defendants is paid for by PFE.)

(PFE agrees that some defendants inspect PFE's mechanical refrigeration units on their lines, and that these "inspections" may include starting, stopping, and regulating the units, but only to the extent that this is then necessary. PFE contends that the defendants have the duty to perform

"fueling and repairing" of PFE mechanical refrigeration units under the provisions of Division Sheet 25, and that pursuant thereto all "fueling and repairing", as well as defendants' charges for refrigerant, lubricating oil and supplies, are paid for by PFE. Division Sheet 25 and Circular 20-F speak for themselves with respect to the description of the respective activities of PFE and the defendants.)

(f) PFE neither furnishes nor performs any servicing whatever on the mechanical refrigeration units while they are on the lines of defendants. All servicing and similar activities with respect to such PFE cars and their mechanical refrigeration units at interchange points beyond the lines of Southern Pacific and Union Pacific which are required by Code of Rules of the National Perishable Freight Committee Circular 20-F are performed by defendants or their contractors, and not by PFE.

(PFE contends there is no dispute between the parties with respect to the activities performed by PFE on the one hand and defendants on the other in connection with the supplying of mechanical protective service to defendants by the mechanical refrigeration units of PFE. However, PFE objects to the description of those activities in the foregoing paragraph on the ground that it is inaccurate. PFE agrees that insofar as the present record before the Court is concerned, PFE's employees do not personally perform the servicing and repairing of PFE's mechanical refrigeration units on the defendants' lines, but points out that in the great majority of instances no servicing whatsoever of the mechanical refrigeration units by defendants is necessary, as the initial make-ready work, repairs, and servicing is performed by PFE forces and thereafter the mechanical refrigeration units are largely self-operating, and that any servicing performed by defendants is paid for by PFE.)

(g) With respect to shipments of perishables which move over the lines of defendants PFE furnishes mechanical refrigerator cars containing mechanical refrigeration units to the originating carriers. Such cars are tendered to defendants at interchange points. PFE does not furnish any servicing of mechanical refrigeration units to defendants while its mechanical refrigerator cars are on defendants' lines. In the territories served by defendants PFE has no employees, facilities or means of furnishing or performing any servicing of any equipment of any kind to any of the defendants. Although PFE does have offices and some employees in some eastern, midwestern and southern cities, the functions of such offices and employees are administrative and clerical and also relate to the furnishing of PFE cars to defendants. Consequently, defendants are compelled to perform all such servicing themselves or to engage third party contractors or other carline companies to perform such servicing. PFE has not performed such servicing for any of defendants.

(Plaintiff contends that in the great majority of instances, PFE forces do not personally perform servicing on defendants' lines, as no servicing whatsoever of the mechanical refrigeration units by defendants is necessary, as the initial make-ready work, repairs, and servicing is performed by PFE forces and thereafter the mechanical refrigeration units are largely self-operating, and that any servicing performed by defendants is paid for by PFE).

(Plaintiff also contends that the duties of PFE employees in eastern, midwestern and southern cities include the tracing and diverting of PFE mechanical refrigerator cars for receivers and shippers located both on and off the lines of defendants, and for the defendants, pursuant to their request.)

(h) PFE does furnish full and complete protective service to its parents, Southern Pacific and Union Pacific, under the Protective Service Contract between them dated June 5, 1963, effective January 1964 and approved by the Commission on September 9, 1963. By paragraph 1 of said agreement PFE agrees "to furnish refrigeration, heating, ventilation and inspection services necessary for the protection of perishable freight" handled by its parents. By paragraph 3 PFE undertakes to "furnish labor, tools, refrigerant, fuel and/or other materials and items necessary to carry out the provisions of this Agreement". Under paragraphs 5 and 9 records are to be kept by PFE, including "records of the handling, inspection, refrigeration, heating and ventilation of shipments." Under paragraph 7 PFE is required to "make studies concerning heat or cold" and perform other services relating to the preparation and publication of protective service tariffs. Paragraph 10 requires PFE to cooperate with its parents "in every reasonable and proper way to promote the mutual interests of the parties hereto with respect to business covered by this Agreement".

(Plaintiff contends that such activities performed for its parents result in shipments of perishables in PFE mechanical refrigerator cars, to which mechanical protective service against heat or cold is furnished by PFE's mechanical refrigeration units, generally moving to their destinations on the railroad lines of the defendants without the necessity of further repairs or servicing by the defendants. Under the provisions of PFE's Protective Service Contract with its parents, which was approved by the Commission on September 9, 1963, the parents pay PFE the full cost of such services and activities.)

17. Another issue relates to Division Sheet 7, published by the National Perishable Freight Committee as to which defendants make the following contentions:

(a) Division Sheet 7 is an agreement between the railroads which are parties to Perishable Protective Tariff 18. While PFE is a carline company rather than a railroad and is not a party to Division Sheet 7, it is referred to therein. However, its parent companies, Southern Pacific and Union Pacific, are parties to Tariff 18 and to the Division Sheet.

(Plaintiff contends that under Division Sheet 7 it is a third party beneficiary of the contract thereby created, and that the Division Sheet constitutes a unilateral contract between all railroads, including the defendants, and PFE. PFE contends that the Division Sheet method of allocating revenues to PFE is invalid and illegal, and was so found by the Commission in its decision in Ex Parte No. 137, *Contracts for Protective Services,* dated August 27, 1962.)

(b) The agreement between the railroads embodied in Division Sheet 7 provides for the division between such railroads of the revenue which they receive from shippers under Perishable Protective Tariff 18 for furnishing protective service. By the express terms of the Division Sheet such revenue is divided as follows: (1) "80% to the carrier initially handling the shipment in line-haul service to be allowed to the car owner to cover cost of ownership of the mechanical unit(s) and other expenses assumed by car owner ***"; and (2) "The remaining 20% of the revenue to be divided between all carriers participating in such service on the same basis as governs the division of the joint through freight rate ***" Division Sheet 7 provides for a like division between the railroads of certain other revenue related to protective service, 80% of such revenue to go to the carrier initially handling the shipment in line-

haul service to be allowed to the car owner, and the remaining 20% to be divided between all participating carriers.

(c) In the present action PFE makes no claim that the railroads which are parties to Division Sheet 7 have not divided the protective service revenue among them as provided in the Division Sheet or that the initial carrier has not made payments to it of the amounts provided to be allowed to it.

(Plaintiff contends, however, that such payments are inadequate, as PFE incurred a deficit in supplying mechanical refrigeration service (including the PFE mechanical refrigeration units involved) to and in behalf of the defendants by sums varying from $2 to $4 million each year. PFE's parents, Southern Pacific and Union Pacific, have paid PFE not only the amounts provided in Division Sheet 7, but additional amounts in order to fulfill their contractual obligations, which have been approved by the Interstate Commerce Commission, to pay PFE the full proportionate costs of rendering mechanical protective service to them on their respective lines.)

18. Another issue raised by defendants is the question whether by its 1962 report in *Ex Parte No. 137* (318 I.C.C. 111) the Commission intended to determine and hold that every railroad in the country over which a PFE refrigerator car equipped with a mechanical refrigeration unit moved was required, under Section 1(14)(b) of the Act, to enter into a protective service contract, agreement or arrangement with PFE and to submit the same to the Commission for approval. In support of their contention that neither the Act nor the Commission's report so require defendants make the following assertions:

(Plaintiff objects to subparagraphs (a) and (b) below on the ground they are sheer argument.)

(a) The railroads who contracted for mechanical protective services with PFE as of December 31, 1959 are listed in appendix A (318 I.C.C. at p. 129) under the headings of proprietary lines, subsidiaries of proprietary lines, non-proprietary lines (only Western Pacific Railroad being so listed) and short-line connections of contract lines. None of the defendants nor any other western, midwestern, eastern or southern railroad is listed in this catalog of railroads under contract for mechanical protective services with PFE.

(Plaintiff contends that the railroads listed as being under contract with PFE are the railroads with which PFE had succeeded in negotiating bilateral contracts, and that its position is that Division Sheet 7 itself constitutes a unilateral contract under which the defendants collectively agree to pay PFE an inadequate and illegal amount for supplying mechanical protective service to them or in their behalf.)

(b) It is the contention of defendants that they were not listed in the PFE catalog of appendix A because, as intermediate and terminating carriers, they had no relationship with PFE which required them to have a contract, agreement or arrangement with it under Section 1(14)(b) of the Act or under the 1962 report.

(Plaintiff objects, in addition to the ground for objection to paragraph 3(a) and (b) stated above, i.e., that the foregoing statement is argumentative, on the further ground that it is a statement of a legal conclusion, and, moreover, such conclusion has no support in the record, for the reason that numerous legal relationships exist between PFE and the defendants, as set forth in the Court's Order of November 16, 1971 ***.)

19. In the first paragraph under the heading of "Findings" of the 1962 report in *Ex Parte No. 137* the Commission found that the unapproved protective service contracts set forth in appendix F of the report were just and reasonable, provided that within 120 days new or superseding contracts were filed. The paragraph then went on to provide: "In the event new or superseding contracts are not filed, further consideration will be given to the issuance of an order finding the presently unapproved contracts not within the requirements of section 1(14)(b)." (318 I.C.C. at p. 127) Defendants assert that PFE, as distinguished from its parents, has never invoked the Commission's jurisdiction by requesting it to enter an order against defendants, or any of them, requiring that they, or any of them, enter into a contract, agreement or arrangement with PFE, and that the Commission has never made any such order.

(Plaintiff objects to the foregoing paragraph 4, on the grounds that (1) it is irrelevant and immaterial whether or not the Commission ever issued an order finding that certain contracts violated Section 1(14)(b), and (2) that the last sentence thereof is specious and misleading. Defendants have chosen to ignore the basis of the Commission's jurisdiction in making the investigation of mechanical protective service which culminated in its 1962 Report and Order in *Ex Parte No. 137*. The Commission's jurisdiction in Part I of the Interstate Commerce Act, which includes Sec. 1(14)(b) extends to "common carriers" and only to "common carriers". In *Ex Parte No. 137* both the Commission's order initiating the proceeding and its 1962 Report and Order were directed to the railroads, as respondents, and not to PFE. Not being a respondent in the proceeding PFE did not contest the Commission's Order, whereas PFE's parents, Southern Pacific and Union Pacific, were respondents

and filed a Petition for a Cease and Desist Order with the Commission, directed against the defendants herein. As pointed out in the Court's Order of November 16, 1971, *** this Petition was denied by the Commission by its Order of May 17, 1966, without prejudice.

Paragraph 4 also ignores PFE's position that the Commission's 1962 Order is self-executing; that the Commission stated at 318 I.C.C. 125 that the railroads "shall submit" new contracts, "which shall replace all prior contracts"; and that "present charges should be revised immediately.")

20. Since PFE is not a common carrier, it is not compelled to furnish mechanical refrigerator cars to any railroad. With knowledge that its parent companies, as originating carriers, tender such cars to defendants at interchange points for movement over their lines, PFE has voluntarily continued to furnish such cars (including mechanical refrigeration units) to its parent companies for such use and has thereby gained monetarily by receiving the profitable car mileage revenue resulting from such use.

(Plaintiff objects on the ground that the foregoing is irrelevant and immaterial and, moreover, that it fails to recognize the right of a shipper under the Interstate Commerce Act to route shipments over such lines of railroads as he desires, and the corresponding duty on the part of the railroads to observe such routing PFE is entitled to enter into the business of owning mechanical refrigerator cars and supplying mechanical protective service (including the furnishing of PFE mechanical refrigeration units) to or in behalf of the railroads. Since the railroads indisputably use PFE's equipment and service it is PFE's contention that they must pay PFE's reasonable cost of rendering such service, in accordance with the Commission's 1962 Order and, in any event, on the basis of *quantum meruit*,

just as the railroads pay for their use of other railroads' equipment generally, as prescribed by the Interstate Commerce Commission in the Per Diem cases (*Baltimore & O.R. Co. v. New York, N.H. & H.R. Co.* (D. Ct., N.Y., 1961) 196 F.Supp. 724; *Chicago, B.&Q. R. Co. v. New York S. & Western R. Co.*, 332 I.C.C. 176 (1968); aff'd. *Boston & Maine R. v. United States*, 297 F.Supp. 218 (1969); and *Union Pacific Railroad Co. v. United States*, 300 F.Supp. 318 (1969); aff'd. 396 U.S. 27, 24 L.Ed.2d 142).)

21. With respect to the fleet of mechanical refrigerator cars which PFE operates through ownership or lease, defendants point out that in the last quarter of 1969 the total mechanical car fleet of PFE consisted of 10,660 cars. According to the 1969 report of PFE to the Commission, as disclosed by Account No. 418, it leased 7,389 cars from its parent lines. 3,697 cars were leased from Southern Pacific for total 1969 rentals of $7,221,116 while 3,692 cars were leased from Union Pacific for total 1969 rentals of $6,969,559, resulting in total 1969 rental payments to its parents of $14,217,675.

(Plaintiff objects to the foregoing paragraph 6 on the ground that the amounts of such lease rentals are irrelevant, immaterial and misleading because they are rentals for the entire car. Only a small portion of such rentals is for the mechanical refrigeration unit. Moreover, the use of the allocated portion of such rentals as rental of the unit results in a substantially lower PFE deficit from the supplying of mechanical protective service to or in behalf of the defendants than if the PFE deficit were computed as if PFE had owned the units. This PFE deficit was over $8 million between 1964 and 1969; as of December 31, 1971, it is estimated as $13 million.)

Based on the foregoing facts and contentions related by the court, our responses to the specific questions, which are quoted, follow:[3]

> A. In its Report and Order of August 27, 1962, did the Commission find that the activities of PFE in preparing, furnishing and servicing mechanical refrigeration units in PFE mechanical refrigerator cars to the defendants constituted "protective service," within the purview of § 1(14)(b) of the Interstate Commerce Act?

Answer: Yes. Although no such specific finding is made in the report and order, it is clear from the terms of the orders and the discussion at pages 111 and 112 of the report that the specified service performed by PFE is included in "protective service." These orders instituted (and subsequently broadened) an investigation to determine, among other things, whether the charges for the use of mechanical refrigeration units for the protection of property, contained in numerous contracts between various rail carriers and the specified protective service companies, and filed with the Commission under the provisions of § 1(14)(b) of the act are just, reasonable, and consistent with the public interest. The fact that the Commission considered the preparing, furnishing, and servicing of mechanical refrigeration units in mechanical refrigerator cars as constituting "protective service" within the meaning of that term as it is used in § 1(14)(b) is further indicated by the discussion at pages 125-126 where it is stated: "In order to avoid the placing upon one protective service the burden of helping to support another protective service, it is desirable that the charge for each protective service be sufficient to cover the costs of

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3. Questions designated I-V hereinafter set forth are reproduced from the court's order of January 20, 1972, but have been redesignated for purposes of continuity in this report.

rendering that service. This also applies to services performed under division sheet 7." Division sheet 7 apparently applies to the preparing, furnishing and servicing of mechanical refrigeration units by, among other parties, PFE.

B. If the Commission so found, is the supplying of such mechanical protective service to the defendants by PFE required to be covered by contractual arrangements which must be submitted to the Commission for approval?

Answer: Yes, the Commission's rules and regulations, 49 CFR § 1032.1, require that any protective service furnished to or on behalf of a railroad shall be covered by a written contract. The Commission's order in the Twentieth Supplemental Report in Ex Parte No. 137, *Contracts for Protective Services*, 318 I.C.C. 111, enlarges this rule by requiring that all contracts, agreements, or arrangements previously filed with and approved by the Commission be superseded by the filing of new ones for its approval in conformity with the criteria set forth in the order. Although division sheet 7, the agreement which the court states applied to the mechanical protective service furnished to the defendants, had not previously been filed with and approved by the Commission, it also was specifically embraced in the terms of that order.

C. In its 1962 Order (39 CFR § 105.2(e)), did the Commission contemplate that in supplying mechanical protective service through the furnishing of a mechanical refrigeration unit, PFE rendered "protective service" as that term is used in the Report and Order?

Answer: Yes. At page 120 of the report, the finding is made that PFE furnishes protective services, and it is observed that PFE's testimony was restricted to, as here

pertinent, mechanical services. Consequently, it was clearly contemplated that the supplying of mechanical protective service by the furnishing of refrigeration units constitutes "protective service."

D. Did the Commission direct PFE to bill the railroads and express companies, on whose lines the mechanical protective service was rendered on a proportionate basis, for the amount of PFE's loss incurred in this service?

Answer: No. The Commission merely required that contracts for protective service include a provision to account for that eventually. At pages 125-126 of the report, it is stated that:

> All rail carriers and express companies receiving protective services under any contracts, agreements, or arrangements requiring approval under section 1(14)(b) of the Interstate Commerce Act shall submit for approval *** new or superseding contracts covering protective services which shall replace all prior contracts, including division sheet 7. *** The provisions of the new or superseding contracts shall be in accord with the requirements hereinafter set forth. ***

The contracts to be filed shall be drawn so as to comply with the following:

* * * * * * *

> 4. In the event the person rendering the services shall not recover costs for any service rendered, such person shall bill the railroads and express companies receiving those services, on a proportionate basis, for the amount of the loss. ***

See also 49 CFR § 1032.2(a) and (e) which codified the Commission's order.

E. Did the Commission contemplate that each carrier participating in a movement of a loaded

mechanical refrigerator car during which mechanical protective service is rendered is legally obligated to share, on a proportionate basis, in the amount of the loss of the person servicing and supplying the mechanical refrigeration unit?

Answer: No. As indicated in the quotation immediately above, it was required that such a provision be included in any contract, agreement, or arrangement filed for approval of the Commission. However, in the absence of such a contract, agreement, or arrangement, the Commission's report and order confers no substantive rights.

F. If the answer to the preceding question is "no", then who did the Commission contemplate would be billed by the person rendering mechanical protective service for the amount of such person's loss?

Answer: As stated above, each participating railroad, on a proportionate basis, as provided in the contracts to be filed for approval of the Commission.

G. If the Commission did not contemplate that the service rendered in furnishing mechanical refrigeration units by PFE constitutes "protective service" to all carriers participating in a particular movement, did the Commission contemplate that the car owner would recover its costs of ownership and operation of the unit through the mileage or other rate paid by car users for the use of the mechanical refrigerator car?

Answer: The Commission did, as previously stated, contemplate that the service of furnishing mechanical refrigeration units constitutes "protective service" to all carriers participating in the movement.

Moreover, as stated in the original report in the proceeding, 246 I.C.C. 145, 146 (1941):

> It is clear that section 1(14) makes a distinction between protective service and the use of the cars which are associated with and necessary to such service. This proceeding is for the purpose of passing upon contracts insofar as they provide for the furnishing of protective service. We shall not here pass upon any contract insofar as it determines the compensation and other terms for the use of refrigerator cars. That matter will be reserved for another proceeding.

And at page 156 of that report, the carriers were admonished:

> 4. In view of the distinction made in section 1(14) of part I of the Act between "car service" payments and "protective service" payments, it would be well for the railroads to make separate contracts for these two forms of service or, in any event, to deal separately with them in a single contract, so that the charges for protective service may be clearly segregated from other charges. ***

Therefore, the compensation for the furnishing of protective service—in this instance, the mechanical protective units—is not to be derived from the amounts paid for the use of the car itself. The two services are distinct and require separate remuneration. See also 318 I.C.C. at page 126.

> H. By its Report and Order of August 27, 1962, did the Commission find that the method set forth in Division Sheet 7 of compensating the owner of the mechanical refrigeration unit by allocating to it 80 percent of the mechanical protective service tariff revenues, would be invalid if new contracts were not filed within 120 days, as the railroads receiving mechanical protective service would not under Division Sheet 7 be compensating the owner, on a proportionate basis, for the amount of its loss?

Answer: No. The order at page 138 [part (a)] provided that the new required contracts would supersede all prior contracts, including division sheet 7, and that such contracts and those filed thereafter should conform to the provisions of the order. However, the order did not per se invalidate or rescind any preexisting contracts, agreements, or arrangements where new agreements or arrangements were not filed with the Commission for approval.

I. If a railroad other than an originating railroad has not filed with the Commission its arrangements with PFE covering the furnishing of mechanical protective service by means of mechanical refrigeration units, was and is such railroad in violation of the Commission's 1962 Order, or was and is it in violation of § 1(14)(b)?

Answer: Yes. Where such arrangements exist, the failure of "all rail carriers" participating therein to file such arrangements with the Commission for approval is a violation of § 1(14)(b) of the act. Moreover, the failure to submit new or superseding contracts in conformity with the terms of the order is also a violation of that order.

J. Is the Commission's 1962 Report and Order in Ex Parte No. 137 self-executing with respect to those intermediate and terminal carriers who refuse to enter into contracts with parties who have furnished mechanical protective service to them?

Answer: The order is binding upon the carriers to comply therewith, and failure to do so subjects them to enforcement action by the Commission. Although the Commission's order requires the carriers to enter into contracts and prescribed certain terms to be included in those contracts, the order itself does not constitute a contract between the parties. In short, the Commission's order does not confer substantive

rights upon the protective service companies to recover losses; that right must, if at all, arise from the contracts required by the Commission's order or by other means.

K. Does the Commission consider § 1(14)(b) to be self-executing with respect to these intermediate and terminal carriers who refuse to comply therewith by refusing to enter into contracts with parties who have furnished mechanical protective service to them?

Answer: No. See the answer to question "J" above.

L. Must there be a contract, agreement or arrangement for mechanical protective service between PFE, a carline company, and every carrier participating in a shipment of perishable commodities by mechanical protective service against heat or cold?

Answer: Yes. See answer to question "B" above.

M. Did the Commission by its 1962 report in *Ex Parte No. 137* intend to require a contract, agreement or arrangement between PFE and every such railroad (including intermediate and terminating carriers) with respect to the furnishing of mechanical protective service?

Answer: Yes. See answer to question "B" above.

N. Will the requirement to submit a contract, agreement, or arrangement for mechanical protective service to the Commission for approval under Section 1(14)(b) of the Interstate Commerce Act vary, depending on whether the mechanical refrigeration unit is owned by (a) a railroad owned carline company; (b) another railroad directly; or (c) a private car owner?

Answer: No. The requirements of section 1(14)(b) of the act are directed to the furnishing of the protective service. It is immaterial how the necessary instrumentalities were acquired by the person or company actually furnishing the service to others.

O. Which of the following items are included in the term "mechanical protective service":

(a) The furnishing of the mechanical refrigerator car by PFE;

(b) The furnishing of the mechanical refrigeration unit by PFE;

(c) The furnishing of or payment for fuel, repairs and other supplies such as lubricating oil and refrigerants for the mechanical refrigeration unit by PFE;

(d) The furnishing of inspection, control, adjustment and maintenance services from certain interchange points to destination by defendants?

(Plaintiff objects to subparagraph (d) above on the ground that it is misleading and misstates the evidence as it ignores the fact that under Division Sheet 7 and Circular 20-F PFE pays for all repairs and supplies placed by defendants on the mechanical refrigeration units supplied by PFE.)

Answer: As stated in the answer to question "G," the furnishing of the car does not constitute protective service; the service is provided through the mechanical protective unit. As set forth in paragraph "14" of the court's statement of facts, the defendants themselves have defined mechanical protective service as "protection furnished the lading by or through the operation of the mechanical unit in a car so equipped." Obviously the unit cannot function without fuel, supplies, and repairs; they are an integral part of the service. If the defendants furnish fuel, supplies, and repairs, the defendants are *pro tanto* furnishing protective service. On the other hand, if the defendants were reimbursed therefor by the plaintiff, the defendants would be acting as agents of the plaintiff, and the protective service would actually be furnished by the plaintiff.

Therefore, "(a)" is not included in the term "mechanical protective service," but "(b)" and "(c)" are. With respect

to "(d)," assuming that it refers to the units, it is included to the extent that those services are necessary to the functioning of the unit and that the costs thereof are not reimbursed by the plaintiff.

P. When a carline company such as Pacific Fruit Express does not have operating personnel or facilities at the interchange points of connecting and destination carriers beyond the lines of its parents and as a result the inspection, control, adjustment and maintenance servicing of mechanical refrigerator units are performed by such carriers or for their account by other carline companies, can it be said that Pacific Fruit Express is furnishing mechanical protective service to such carriers by furnishing mechanical refrigeration units to them?

(Plaintiff objects to question [P] above on the grounds that it is misleading for the reasons previously stated * * * above.)

(Question [P] also ignores the provisions of Division Sheet 25 and Circular 20-F (part of the record in this action) which impose the obligation on PFE to pay for all repairs and fueling. Question [P] also ignores PFE's contention that in the great majority of instances no servicing whatsoever of the mechanical refrigeration units by defendants is necessary, as the initial make-ready work, repairs, and servicing is performed by PFE forces and thereafter the mechanical refrigeration units are largely self-operating, and that any servicing performed by defendants is paid for by PFE. PFE agrees that the defendants "inspect" PFE's mechanical refrigeration units, and that such "inspection" may include "control" and "adjustment" of the units.)

(Question [P] is also misleading in that it characterizes PFE's activities as "furnishing mechanical refrigeration units to them" * * *, thereby ignoring the evidence of record that PFE does much more than

furnishing the unit. As heretofore stated, PFE makes ready the unit for service on all lines of railroads by its repair, maintenance, fueling and preparation activities at PFE's shops and yards, and PFE pays for all repairs and fueling done by the defendants.)

Answer: See answer to question "O" above.

Q. Has the Commission ever ordered any railroad serving eastern, southern or midwestern territory to enter into a contract with PFE for the furnishing of mechanical protective service against heat or cold to perishable shipments by mechanical refrigeration units, or to submit any such contract, agreement or arrangement to the Commission for approval pursuant to section 1(14)(b) of the Act? If so, identify any such order by date and citation.

Answer: Yes, if PFE renders protective service to or on behalf of the carriers operating in those territories. See answer to question "B" above. The rules and regulations were originally prescribed in the order of October 15, 1940, 5 F.R. 4253.

Q. Are intermediate and terminating carriers obligated under the Interstate Commerce Act to accept mechanical refrigerator cars tendered to them at an interchange point so long as such cars are in safe operating condition, the mechanical refrigeration unit is operating properly and the cars are accompanied by proper waybill instructions complying with established tariff authority?

Answer: Yes. The term "transportation," as defined in part by section 1(3)(a) of the act, includes "ventilation, refrigeration or icing * * *." Section 1(4) makes it the duty of each railroad "to provide and furnish transportation upon reasonable request therefor * * *." Moreover, it has long been established that a shipper has a right to have his

freight transported from origin to destination over two or more carriers without a transfer of lading at junction points. *Missouri & Illinois Coal Co. v. Illinois Central R. Co.*, 22 I.C.C. 39 (1911). Finally, it is to be noted that section 15(8) of the act permits a shipper to specify the routing of his shipments.

> S. Are the carline companies parties to Division Sheet 7?
>
> (Plaintiff objects to question [S] on the grounds that (1) it calls for the Commission's conclusion on a matter of law; (2) the question calls for an answer which is beyond the scope of the *Ex Parte No. 137* proceeding; and (3) the question should be limited, in any event, to PFE, as the relationship of other carline companies to the defendants is beyond the scope of this proceeding.)

Answer: Division sheet 7 and its supplements are not officially on file with the Commission but rather are provided for informational purposes only. The information furnished the Commission shows that the latest rule for application of division sheet 7 is in item 5-H of supplement 80 thereof, effective January 17, 1972, which reads as follows:

> Basis of divisions as published herein governs the division of revenue received under the rules and charges for protective services to perishable freight as published in Perishable Protective Tariff 18, I.C.C. 37 * * * or reissues.
>
> The provisions of this Division Sheet apply for account of all lines parties to Perishable Protective Tariff 18, I.C.C. 37 * * * or reissues.
>
> See also paragraphs A-11, 12, 14, 15, or 17 of Item 25 for provisions governing allowances to mechanical car owner in connection with special rates not subject to Mechanical Protective Service charges published in Section 7 of Perishable Protective Tariff 18.

The list of lines participating in the Perishable Protective Tariff contains the names of no carline companies. The second paragraph above indicates that such lines must be parties to the protective tariff in order for them to be parties to division sheet 7. The Commission, however, is not in a position to make a judgment on this question, since division sheet 7 is not officially on file.

T. Are the *Ex Parte No. 137* regulations intended to bind railroads other than those which were made parties to that proceeding (as listed in Appendix A or Appendix F to the 1962 report) and which other railroads are not presently parties to any protective service contracts?

(Plaintiff objects to question [T] on the grounds that it is (1) misleading; (2) it fails to recognize the Commission's Second Supplemental Order in *Ex Parte No. 137*, dated December 9, 1959; and (3) it is beyond the scope of the *Ex Parte No. 137* proceedings. That one or more of the defendant railroads voluntarily chose not to appear in the *Ex Parte No. 137* proceedings, or take any part in the hearings, does not mitigate against the I.C.C.'s Orders being effective as to such railroads, where, as here, the Commission had jurisdiction over all railroads under Sec. 1 (14)(b) of the Interstate Commerce Act. While it appears obvious, under the Commission's Second Supplemental Order, dated December 9, 1959, that the Commission was investigating the reasonableness of all charges for mechanical protective services against heat or cold "contained in contracts or amendments to contracts which require approval" under Sec. 1 (14)(b) of the Act (see 318 I.C.C. 111, at 112), the status of railroads who did not actually appear in the proceeding, or who have not presently entered into express bilateral protective service contracts, is a legal question which is beyond the scope of *Ex Parte No. 137*. Moreover, it is irrelevant and immaterial to the disposition of the

ultimate issue in this litigation, which is whether PFE is entitled to recover the reasonable value of the services performed by PFE for and in behalf of the defendants in supplying them with mechanical protective service against heat or cold.)

Answer: Yes. The rules and regulations prescribed in connection with the Twentieth Supplemental Report in *Contracts for Protective Services*, 318 I.C.C. 111, are the result of an investigation to determine, among other things, whether the findings and orders in prior proceedings in Ex Parte No. 137 should be modified, changed, or amended in any respect. See second supplemental order, December 9, 1959, 24 F.R. 10420. Notice of the pendency of the proceeding which resulted in the Twentieth Supplemental Report was given by publication in the *Federal Register*, as cited above. Subsequently, hearings were conducted in which any interested railroad not specifically named as a respondent could have participated. Thus, compliance was made with the notice and hearing requirements for rulemaking contained in the Administrative Procedure Act, sections 553(b) and (c). Having fulfilled the requirements for rulemaking, the Commission clearly intended that the rules and regulations prescribed in connection with the Twentieth Supplemental Report would have application to all railroads, and the rules and regulations are so framed.

U. Does the 1962 report in *Ex Parte No. 137* and the regulations adopted pursuant to it require that the owner of a mechanical refrigeration unit furnishing mechanical protective service receive, over and above its costs, a profit of 6%, or do they simply permit a profit of not to exceed 6%?

Answer: The Commission's rules and regulations permit but do not require a profit margin not in excess of 6

percent of the book cost of the property and equipment employed in furnishing the service, less accrued depreciation, plus an allowance for working capital. Therefore, 6 percent is the maximum level of profit permissible.

V. Has the Commission ever issued an order disapproving the contracts set forth in appendix F of the 1962 report in Ex Parte No. 137 (318 I.C.C. at p. 127)?

(Plaintiff objects to question [V] on the ground that it is irrelevant and immaterial whether the Commission ever issued an Order disapproving certain protective service contracts, as the Commission stated that, "the railroads shall file new or superseding contracts consistent with the regulations set forth in appendix G hereto" (318 I.C.C. 111 at p. 127) and the Order to that extent is self-executing. Plaintiff contends that it is not relevant whether the Commission ever issued an order disapproving certain contracts, in view of the Commission's Order of August 27, 1962 requiring that, in the event the person rendering protective services shall not recover its costs for any service rendered, such person shall bill the railroads receiving those services, on a proportionate basis, for the amount of the loss. Plaintiff's position is that there was no need for the Commission to issue an express Order finding unapproved contracts not within the requirements of Sec. 1 (14)(b) as any violation of Sec. 1 (14)(b) or the provisions of the Order would be self-evident.)

Answer: No such order has been entered.

COMMISSIONER WALRATH did not participate.

It is ordered, That this report and order be served upon The Honorable W. T. Sweigert, District Judge, United States District Court for the Northern District of California, as a declaration and response to matters raised in his

order entered on November 16, 1971, as amended by his orders entered on December 14, 1971, and January 20, 1972.

And it is further ordered, That this proceeding be, and it is hereby discontinued.

By the Commission, division 2.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Appendix F

Judgment of the District Court

United States District Court
Northern District of California

Civil No. 44601-WTS

Pacific Fruit Express Company, et al.,
Plaintiffs,

v.

Akron, Canton & Youngstown Railroad Company, et al.,
Defendants.

JUDGMENT AND ORDER
(Dated and filed March 7, 1973)

Plaintiff Pacific Fruit Express Company's motion and defendant railroads' counter motion for summary judgment on the issue of defendants' liability for damages based on their violations of several sections of the Interstate Commerce Act, and other grounds, and plaintiff's motion for summary judgment that a mandatory injunction should issue pursuant to 49 U.S.C. Sec. 16(12) (Sec. 16(12) of the Interstate Commerce Act) to compel defendants to obey an order of the Interstate Commerce Commission of August 27, 1962, in Ex Parte 137, *Contracts for Protective Services* (with respect to which motion for injunction the United States, a statutory defendant, has realigned as a party plaintiff and the Interstate Commerce Commission ("I.C.C.") has intervened as a party plaintiff and joins in plaintiff's motion), having been argued and briefed; and

The Court having made its order on December 11, 1972, granting the motions for summary judgment in favor of plaintiff and intervenor; and

The Court having filed its Memorandum of Decision on March 2, 1973, which constitutes findings of fact and conclusions of law to the extent that such findings and conclusions may be necessary; and

The Court having concluded, as set forth in said Memorandum of Decision, that there are no genuine issues as to any material fact, and that plaintiff is entitled as a matter of law, pursuant to 49 U.S.C. Secs. 8, 9, 16(7), and 1(14)(b) (Secs. 8, 9, 16(7) and 1(14)(b) of the Interstate Commerce Act), and upon quantum meruit as an additional basis of plaintiff's action, to a judgment in its favor on the issue of the defendants' liability for damages occurring since January 1, 1964, together with interest, attorney's fees and costs of suit; and having reserved power to make such further orders as may be necessary to determine such amounts; and

It further appearing, as set forth in said Memorandum of Decision, that there are no genuine issues as to any material fact and that plaintiff is entitled to judgment as a matter of law in the form of injunctive relief pursuant to 49 U.S.C. Sec. 16(12) (Sec. 16(12) of the Interstate Commerce Act); it is

ORDERED, ADJUDGED AND DECREED that defendant railroads and each of them, and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, should be, and they are hereby enjoined from continuing to fail, neglect or refuse to comply with that certain order of the I.C.C. dated August 27, 1962, and, further, shall,

within 60 days from the date of this order, or within such further time as the court may hereafter order, obey said order by forthwith entering into good faith negotiations with plaintiff and entering within such period, into new, superseding contracts with plaintiff, or among themselves expressly for the benefit of plaintiff, to be effective January 1, 1973, (the beginning of PFE's annual accounting period) covering protective services heretofore or now being performed under the provisions of Division Sheet 7, or any other existing contract—said new, superseding contracts to conform in substance with the provisions of subsections (b), (c), (d), (e), (f) and (g) of said I.C.C. order of August 27, 1962—and, within said period, submit said new, superseding contracts to I.C.C. for approval under Sec. 1(14)(b) and Sec. 16(7)—at defendants' expense and diligently prosecute said submission to the end that approval of said contracts may be obtained as soon as possible.

It is further ordered that, if such new superseding contracts have not been submitted to I.C.C. within the period herein fixed on account of failure of the parties to agree upon the form or content of such contracts, the parties shall, within 20 days from the expiration of said initial 60 day period, petition I.C.C. for its approval or disapproval of such provisions as to which said parties do agree and also for approval, disapproval or modification of such further provisions, proposed by either party, as to which the parties cannot agree and for such further instructions or further orders as I.C.C. may deem necessary concerning the form or content of such contracts as are herein ordered consistent with its previous orders of August 27, 1962, February 28, 1972, and this order. The court desires that such I.C.C. consideration, if required, take place as expeditiously as possible.

The court reserves power to supervise the injunctive provisions of this order, and to enforce the same, but compliance with the above procedure, and with any I.C.C. order made as a result thereof and consistent with the I.C.C. previous orders of August 27, 1962, February 28, 1972, and this order, shall be deemed compliance to that extent with this order and, likewise, failure or refusal of any party to follow such procedure shall be deemed to that extent a non-compliance with this order.

On the expiration of the 60 day period above fixed, or the expiration of such extension thereof, as may be hereafter made, the parties shall jointly or separately report to this court upon the progress of compliance with the injunctive order herein made.

Dated: March 7th, 1973.

W. T. SWEIGERT
W. T. Sweigert
United States District Judge

Appendix G

Statutes Involved

1. United States Code, Title 49, Section 1(13) (Interstate Commerce Act, Section 1(13)):

   "(13) The Commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto."

2. United States Code, Title 49, Section 1(14)(a) (Interstate Commerce Act, Section 1(14)(a)):

   "(14)(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

3. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)):

   "(b) It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property

transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941."

Appendix H

Interstate Commerce Commission Order of August 27, 1962

Interstate Commerce Commission

EX PARTE NO. 137

CONTRACTS FOR PROTECTIVE SERVICES

Decided August 27, 1962

Contracts and amendments to contracts concerning charges for protective services filed by common carriers by railroad approved upon condition that new contracts be filed. Regulations governing the filing and content of new contracts prescribed. Prior reports: 246 I.C.C. 145 and 737, 251 I.C.C. 807, 253 I.C.C. 21 and 649, 255 I.C.C. 729 and 816, 256 I.C.C. 196 and 454, 258 I.C.C. 802, 262 I.C.C. 801, 263 I.C.C. 802, 266 I.C.C. 803, 268 I.C.C. 803, 269 I.C.C. 802, 272 I.C.C. 243, 273 I.C.C. 269, 274 I.C.C. 801, 276 I.C.C. 323, 278 I.C.C. 801, 278 I.C.C. 531, 279 I.C.C. 801, and 281 I.C.C. 801.

(Appearances)

TWENTIETH SUPPLEMENTAL REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND HERRING

GOFF, *Commissioner:*

Exceptions to the report and order recommended by the examiner were filed by various respondents. We have heard the proceedings in oral argument. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By order dated October 28, 1958, division 3 instituted an investigation to determine whether the charges for the use of mechanical refrigeration units for the protection of property, contained in numerous contracts between various rail carriers and Fruit Growers Express Company, American Refrigeration Transit Company, Burlington Refrigerator Express Company, and Western Fruit Express Company, and filed with the Commission under the provisions of section 1(14)(b) of the Interstate Commerce Act, are just, reasonable, and consistent with the public interest. All common carriers by rail parties to the contracts were made respondents to the proceeding.

By supplemental order dated May 20, 1959, division 3 broadened the proceeding to include in the investigation the charges for the use of mechanical refrigeration units set forth in contracts between Merchants Despatch Transportation Corporation and The New York Central Railroad Company and between M. J. Schiffer, doing business as M. J. Schiffer Company, and the Illinois Central Railroad Company. The New York Central and the Illinois Central were made respondents to the proceeding.

By a second supplemental order dated December 9, 1959, the scope of the investigation was further broadened to include (1) the justness and reasonableness of all charges for protective services against heat or cold contained in contracts or amendments to contracts which require approval pursuant to section 1(14)(b) of the act, and (2) the propriety, if any, of modifying, amending, or changing in any respect the Commission's approvals, findings, and orders in prior reports in this proceeding as they may affect the contracts or amendments thereto filed for approval. All rail carriers having contracts or amendments on file requiring approval were made respondents.

Protective service against heat or cold, where necessary for the preservation of perishable commodities in transit, is a duty of a common carrier by railroad for which it is responsible to the shippers of such commodities. The railroads hold themselves out to furnish such service and publish tariffs of charges therefor, and the shippers pay those charges to the railroads. Many of the Nation's railroads contract these protective services out to so-called car-line companies or to private unaffiliated companies. The stock of the car-line companies is owned by the various railroads and in most instances the car-line company owns the refrigerator cars which they rent to the railroads in addition to furnishing the protective services.

Section 1(14)(b), as here pertinent, provides as follows:

> It shall be unlawful for any common carrier by railroad or express company * * * subject to this part, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier * * * of protective service against heat or cold to property transported or to be transported in interestate or foreign commerce, or for any such carrier * * * to continue * * * as a party to any such contract * * * unless and until such contract * * * has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest.

In its first formal report concerning the administration of this subsection the Commission, division 3, laid down certain broad principles designed to govern contracts for protective services. Ex Parte No. 137, *Contracts for Protective Services*, 246 I.C.C. 145 (1941). One of those principles was (page 155):

> The car-line companies should bill each individual railroad for the services which it renders to it, on the

> basis of cost plus a reasonable profit. Profit will, of course, fluctuate with volume of traffic. The aim should be to realize, under normal conditions, about 6 percent on the fair value of the property. It is recognized, also, that it will be necessary for practical purposes, to arrive at costs to some extent by an averaging process, without meticulous regard for individual conditions.

Many of the rail carriers having contracts for the furnishing of protective services received the Commission's approval of these contracts in 1941 and others have been approved in subsequent years. In the absence of exact data, it was necessary for the parties to rely to a certain extent upon estimated costs. Where, for example, the unit cost method was used, the final unit cost for any given year was largely dependent upon the volume of service units performed during the year. Therefore, some of the contracts provided for an adjustment of the charges which shall have been paid to the actual cost as determined at the close of the contract year. In the twelfth supplemental report of the Commission in Ex Parte No. 137, 272 I.C.C. 243 (1948), division 3, at page 254, stated that "In order to keep the approved unit prices as nearly equal as possible to actual costs, a number of the carriers have been amending their contracts at frequent intervals. This is a burdensome practice. If practicable, it may well be avoided." It then suggested that the carriers and the car-line companies[1] give consideration, "to means for revising the manner of stating unit prices." Responsive to the division's suggestion the interested carriers and car-line companies held a conference and developed an escalator-revision clause for increases and decreases. This clause was discussed by division 3 in the

1. The term "car-line company" as used in this report generally refers to railroad-owned companies furnishing protective services and/or car services to railroads.

fifteenth supplemental report of the Commission in Ex Parte No. 137, 276 I.C.C. 323 (1949) where it said, at page 325:

> In order to obviate the necessity of frequent amendments of existing contracts to embrace the variations in costs the following provision has been added to such contracts by the interested parties in the amendments referred to above preceding the unit prices shown therein:
>
> "The carrier shall pay the car line for its services hereunder the charges which follow: provided, however, such charges may be revised by the carrier and the car line from time to time as changed conditions warrant, without submission to the Interstate Commerce Commission for its approval, when such revisions do not exceed 15% upward or downward from each unit price as approved by the Interstate Commerce Commission."
>
> The instability of costs in recent years warrants some relief from the requirement of amending existing contracts to cover these variations. In the circumstances we approve the foregoing provision, but it is essential that we be informed as to any departures from the terms of the contracts. Therefore, in instances where this provision is invoked by the parties in their settlements the carriers will be expected to report to us at the end of the settlement period the actual amount paid by them.

Following the report in 276 I.C.C. 323, many of the contracts providing for the furnishing of protective services were amended and a 15-percent escalator-revision clause was inserted to apply to the various unit prices for services rendered.

Prior to 1953, protection of perishable commodities from heat or cold required such services as supplying ice and salt to the cars, supplying fuel to car heaters, and inspection

and supervision, including adjustment of ventilators. These various services were set up on a unit price basis to which the above-mentioned 15-percent escalator-revision clause was to apply. As hereinafter indicated, in a number of instances these unit prices have been increased more than 15 percent, especially where a comparison of a unit price of 1 year is made with the unit price of the same service in earlier years. When mechanical refrigeration service was introduced new items were added to the contracts involving unit prices such as: use of mechanical units, inspection and servicing mechanical units, and fuel for mechanical units. To date, the Commission has not approved any contract containing charges for the furnishing or servicing of mechanical refrigeration units.

In the absence of a contract providing unit prices, the tariff charges for mechanical protective services assessed the shippers are divided according to division sheet 7, entitled "Basis of Divisions Applying in Connection With Charges for Protective Services as Published in Perishable Protective Tariff 16 or Successive Issues Thereof," originally issued by the National Perishable Freight Committee in 1953. It provides that 80 percent of the tariff charges are to be paid to the carrier initially handling the shipment in line-haul service to be allowed to the car owner to cover costs of ownership of the mechanical units and other expenses assumed by the car owner. The remaining 20 percent is to be divided among all railroads participating in the shipment on the same basis as that governing the division of the joint through rates over the route of movement. The division sheet is published on a national basis for the account of all carriers parties to the perishable protective tariff, which includes practically all of the railroads in the United States.

The 80-20 percent ratio is said to have been developed from conservative estimates of what the costs might be. Under the provisions of the division sheet, the car lines or others furnishing protective services assume all of the operational costs of the mechanical units such as fuel, inspection, and repairs. For some services, the division sheet provides uniform prices, such as the charge of 16 cents per gallon of fuel oil, which might or might not be fully compensatory, depending upon the cost of the oil at the time furnished. The charges published in the perishable protective tariff vary widely according to the commodity shipped. Two carloads originating and terminating at the same stations but containing different commodities in a non-frozen state could result in revenue varying as much as 40 percent. In view of the varying revenues resulting from the tariff charges, the 80 percent thereof received by the car owner has no relation to costs.

Fruit Growers Express Company, Burlington Refrigerator Express Company, and Western Fruit Express Company. — These three companies (hereinafter referred to respectively as FGE, BRE, and WFE), are under the same general management. As of December 31, 1959, FGE had contracts for furnishing protective services with its 18 proprietary lines and with subsidiaries of proprietary and non-proprietary lines as shown in appendix A hereto. BRE has protective service contracts with its proprietary line, the Chicago, Burlington & Quincy Railroad Company (the Burlington), with the Colorado & Southern Railway Company, and the Fort Worth & Denver Railway Company, both subsidiaries of the Burlington. WFE has a contract with its sole proprietor the Great Northern Railway Company.

The contracts between the railroads and the companies are similar. FGE, BRE, and WFE are parties to a unit-price form of contract which may remain in effect indefinitely, subject to termination upon 12 months' notice by either party. The railroads retain the revenue received from the protective service charges paid by the shippers and they compensate the car-line companies upon an agreed basis for each unit of service performed. The unit prices for the particular service rendered are the same for all proprietary lines, but are 10 percent higher for non proprietary lines. Appendixes B, C, and D show the classes of service furnished and the unit prices charged in 1959 by the respective companies.

These car-line companies submitted exhibits showing the unit prices for services to their properietary lines from the effective date of the last approved contract amendment, February 1, 1951, through the contract amendments effective January 1, 1959. The unit prices of FGE are shown in the following table:

Fruit Growers Express Company proprietary unit prices by effective date

Class of Service	Feb. 1 1951	Jan. 1 1953	Jan. 1 1956	Jan. 1 1957	Jan. 1 1958	Jan. 1 1959	Percent Increase[1]
Salt—furnished by FGE	$0.99	$0.99	$1.11	$1.17	$1.22	$1.24	25.3
Supervision (icing in bunkers)	2.08	2.08	1.87	2.23	2.54	2.40	15.4
Supervision (icing in body)	2.08	2.08	1.87	2.23	2.54	2.40	15.4
Supervision (when no ice is supplied)	1.27	1.27	1.42	1.46	1.72	1.85	45.7
Repairs to refrigerating devices (two bunkers)	5.00	5.00	7.65	8.65	8.65	8.65	73.0
Repairs to refrigerating devices (one bunker)	2.50	2.50	3.82	4.33	4.33	4.33	73.2
Repairs to damage caused by top or body ice	6.52	6.52	9.24	9.79	9.79	9.79	50.2
Car heaters	.85	.85	.70	.97	1.06	1.06	24.7
Heater fuel	.61	.61	.66	.66	.80	.80	31.1
Servicing of heaters	1.48	1.48	1.49	1.63	1.71	1.71	15.5
Supervision (heater service)	1.34	1.34	1.31	1.41	1.57	1.57	17.2
Inspection (ventilation)	1.59	1.59	1.50	1.38	1.59	1.68	5.7
Use of mechanical units (frozen commodities)	—	75.00	83.24	83.24	83.24	83.24	—
Use of mechanical units (other commodities)	—	50.00	55.49	55.49	55.49	55.49	—
Inspecting and servicing mechanical units	—	2.08	3.40	3.31	3.92	4.24	—
Fuel oil mechanical units (diesel)	—	.15	.12	.13	.14	.13	—
Fuel oil mechanical units (gasoline)	—	.25	—				
Cleaning cars	2.24	2.24	2.36	2.46	2.67	2.79	24.6
Loss and damage claim expense (ice refgn.)	.56	.56	.46	.46	.59	.59	5.4
Loss and damage claim expense (heater)	.06	.06	.03	.06	.06	.06	—
Loss and damage claim expense (mech. refgn.)				—	—	.51	—

[1]Increase Jan. 1, 1959, over Feb. 1, 1951.

As shown, the unit prices for nonmechanical protective services were not changed between February 1, 1951, and January 1, 1956, but for each of the years since the latter date increases have been made with the exception of two nonmechanical items. Twelve of the fourteen figures in the last column show that the unit prices increased in excess of 15 percent, 1959 over 1951. The increases are relatively small compared with the increased cost of material and

wages, and this is attributed to more efficient operation. The 1951 unit prices were based on 1950 costs when the average rate of pay for FGE employees was $1.53 per hour. In 1959 the average rate of pay had increased to $2.47 per hour. However, the greatest variable in arriving at unit prices is the volume of services performed. In this connection, it is noted that since 1953, when mechanical refrigeration units were first installed, the number of bunker icings has been on the decline.

Similar data was submitted with respect to the unit prices of WFE. As to that company, 10 unit prices increased in excess of 15 percent and 2 decreased. An increase of 172 percent in the unit prices for furnishing car heaters is listed, which is attributed to the transition from charcoal to the more automatic alcohol heaters. In the case of BRE, increases in the unit prices, January 1, 1950, over January 1, 1956, exceeded 15 percent in 10 instances, and decreases are shown in 4 instances. An increase of 133.3 percent in the price of car heaters is explained the same as above. The prices for the nonmechanical services shown in the preceding table are stated to be based on costs during the preceding year plus a reasonable profit. However, since costs are sensitive to the volume of service units performed, the prices paid at times were less than cost and infrequently more than cost plus 6 percent.

The amendments to contracts effective January 1, 1953, between the railroads and FGE, BRE, and WFE were the first to contain unit prices for the furnishing of protective services by means of mechanical refrigeration. As of December 1959, these companies operated approximately 22,000 refrigerator cars, of which 1,200 were mechanically refrigerated. FGE and WFE purchase their own mechanical units for installation in the cars. The mechanical units used by BRE are leased from the Burlington. The unit prices applying to mechanical refrigeration are composed of three

items, (1) the use of mechanical units, including repairs and depreciation; (2) inspecting and servicing; and (3) the fuel oil consumed. When mechanical refrigeration was first used, only frozen commodities were hauled and the price for use of the unit was arbitrarily set at $75 per car. Since the charges to shippers for fresh commodities were two-thirds of those for frozen commodities when shipped with ice refrigeration, the price for mechanical refrigeration of fresh commodities (item (1) above) was abritrarily established at $50 per car. That same relationship is maintained at the present time, although the unit prices, except those of BRE, have been increased because of increased costs.

Cost data were submitted with respect to each of the three items above for the years 1952 through 1958. In connection with item (1), the total costs allocated thereto were divided by the number of units furnished to arrive at the unit cost. Unit costs and prices for the years 1956, 1957, and 1958 are shown, as follows:

	Item 1		Item 2		Item 3	
	Unit cost	Unit price	Unit cost	Unit price	Unit cost	Unit price
FGE						
1956	$ 80.37	[1]$83.24 255.49	$3.31	$3.40	$0.13	$0.12
1957	79.28	183.24 255.49	3.92	3.31	.14	.13
1958	103.33	183.24 255.49	4.24	3.92	.13	.14
BRE						
1956	100.05	175.00 250.00	3.70	3.27	.14	.13
1957	102.97	175.00 250.00	4.02	3.27	.14	.13
1958	124.07	175.00 250.00	4.89	3.27	.14	.13
WFE						
1956	95.18	175.00 250.00	5.55	4.60	.17	.16
1957	92.01	195.18 263.46	6.04	4.60	.17	.17
1958	110.24	192.01 261.34	6.38	4.60	.16	.17

[1]Frozen commodities.
[2]Fresh commodities.

The overall picture establishes that the three car-line companies rendered mechanical refrigeration services at less than cost, and the representative of the car-line companies admitted that the unit charges are not equal to costs. There are certain deficiences, however, in the cost data used for determining unit prices which render it impossible to determine precisely present unit costs and to compare with any degree of accurateness such costs with the revenues obtained for furnishing mechanical refrigeration units. For example, the average costs shown reflect the number of shipments of frozen commodities, but only two-thirds of the shipments of nonfrozen commodities. This resulted from the method used in establishing the charges for the respective commodities, hereinbefore described. This price determination was based on the belief that the same unit price relationship must exist with respect to mechanical refrigeration as was thought to exist on shipments of frozen and nonfrozen commodities when cooled by ice and salt, and not on a demonstrated cost difference. In determining the unit cost for "use" of the mechanical unit for 1959, the FGE used the total of 10,300 shipments in 1958, arbitrarily adjusted as follows:

Railroads	Number of shipments of commodities		
	Frozen	Nonfrozen	Total
Proprietary lines (contract)	3,567	1,702	5,269
Nonproprietary lines (contract)	2	14	16
Noncontract lines	4,335	680	5,015
Total	7,904	2,396	10,300

The 2,396 nonfrozen shipments were reduced by one-third or 799. The resulting 1,597 was added to the frozen shipments, making a total of 9,501. Dividing costs reported as $981,727 by 9,501 produced a unit cost in 1958 of $103.33 per shipment. The FGE, however, charged only $83.24 in 1959, which was the same as the unit price charged in 1958.

Although total shipments are used as a basis for ascertaining costs, the unit price based on such costs is applicable only to contract railroads. The 3,569 shipments of frozen commodities on contract lines added to two-thirds of the 1,716 shipments (1,144) of nonfrozen commodities produces a total of 4,713 shipments made by contract railroads, to which the unit prices apply. The remaining 4,788 (adjusted) shipments, more than 50 percent of the total shipments, were paid for under the division sheet. The FGE does not separate cost between contract and noncontract shipments. Since, as indicated, on shipments of perishable commodities carried on railroads having no contracts with FGE for protective service, FGE receives payment in accordance with the division sheet in the same manner as other car lines which have no contracts with those railroads, the cost basis used to determine unit prices charged to contract carriers includes the cost of shipments by noncontract lines, and the revenues received from noncontract carriers based on 80 percent of tariff charges are dependent not on the cost of service but on the type of commodity shipped and the stations involved. Thus, the unit price is not determined on ascertainable costs.

In 1958, FGE purchased 2,025,916 gallons of fuel oil at a total cost of $268,934, equivalent to a unit cost of 13.32 cents per gallon. The unit price in 1959 was 13 cents. The annual report for 1958 showed the fuel cost to be $526,460 before allowance for storage, interest, and the other overhead allocations. The difference was not fully explained, but it was stated that the cost of fuel supplied to noncontract railroads was not included in the computation of 13 cents. The unit price for fuel oil furnished in 1958 by the FGE to railroads not having contracts was 16 cents a gallon, as provided in the division sheet, although the price charged

to contract railroads in 1958 was 14 cents. The unit prices that FGE charges to nonproprietary railroads are 10 percent higher than the prices in the contracts with proprietary lines, and it is not shown that this difference is based on a cost differential.

The above comments are equally applicable to the unit costs shown by BRE and WFE.

Certain factors peculiar to the operations of BRE should be observed. BRE does not own refrigerator cars or mechanical refrigeration units. Both cars and units are rented from its parent, the Burlington, and they are rented back to the parent under car service and mechanical protective service contracts. The Burlington includes the cost of these cars and units in its total investment in transportation property which is ultimately considered in the bases for its line-haul rates. Neither the Burlington nor the BRE submitted sufficient details to ascertain definitely the depreciation charges for the mechanical units. Although the vice president and comptroller for the three car lines testified that because of increases in wages and materials it was necessary periodically to increase the unit prices charged by the FGE and the WFE, there have been no similar increases in the unit prices charged by the BRE to its parent or the latter's subsidiaries.

While the three car-line companies presented cost evidence showing the various items of expense incurred in rendering mechanical protective services, only the total expenses incurred in rendering nonmechanical protective services were submitted. The number of units of each type of service performed in 1954 through 1958 are shown, but it is not possible to determine the cost per unit of service by dividing the number of service units rendered into total expenses, because the expenses are not broken down into

the service units rendered. For example, the following units of service rendered by FGE are shown for 1958: Salt—333,170; Supervision, icing in bunkers—390,490; Supervision, icing in body—5,071; Supervision, no ice supplied—378,076; Repairs to refrigeration devices—58,434; and Repairs to damage, top or body ice—98,961. The total expenses (less interest and plus taxes) which include such services are grouped under "Icing Protective Service" and "Other Icing Protective Service" and are shown as $6,598,640 and $2,490,797, respectively. It was testified that there was no breakdown of costs for these items and other specific items because of the tremendous amount of work involved, that we should be aware of the increase in wages and materials, and that, accordingly, we should approve the increased prices.

The companies are of the view that the 6 percent profit referred to as reasonable in prior reports in this proceeding is a maximum and is not a mandatory requirement, and they are willing to render protective services at cost, since they make a profit on rentals of refrigerated cars. Nevertheless, they are of the opinion that they are entitled to make a profit. The record shows that FGE has for many years made a small profit on its overall protective services. Thus, the profit for 1959 is shown as $47,274. On the other hand, WFE and BRE show deficits for 1959 of $81,184 and $77,486, respectively. To the extent that the losses from protective services are compensated for by profits from the rental of refrigerator cars, the parent companies absorb the losses through reduction in dividends.

Pacific Fruit Express Company.—This company (hereinafter called PFE) is owned jointly by the Union Pacific Railroad Company and the Southern Pacific Company. The Western Pacific Railroad Company is a contract road. PFE

supplies refrigerator cars and furnishes protective services to its parent lines, their subsidiaries, and to short-line connections of contracting railroads, shown in appendix A. The major source of income of the PFE is from car services, and the proprietary railroads absorb all losses from protective services through reduced dividends. The Union Pacific and Southern Pacific regard the division sheet referred to above as a unilateral contract for the furnishing of mechanical refrigeration protective services. They have filed no other contract for mechanical refrigeration services with us for approval. In 1942, we approved a so-called standard refrigeration contract, concerning ice and salt, between the PFE and its parent companies. That contract is presently in existence, and no amendment is pending. The testimony of the witness for the PFE was restricted to mechanical services and to an unapproved contract for installation of heaters at El Paso, Tex., with the Chicago, Rock Island and Pacific Railroad Company.

Appendix E hereto shows the operating results of PFE for the years 1958 and 1959. The net revenues and losses pertaining to individual services as there shown do not include a proportionate share of the general expenses and tax accruals. After such allocations, the expenses would be materially increased. As to the results of performing mechanical protective services, it is shown that after allocation of operating expenses for mechanical protective services for 1958 there was a deficit of $1,120,689.62; that an allowance for interest on investment would amount to $412,501.13, and an allowance for Federal income taxes of $171,296.53, neither of which is included as an expense; and that when all costs are considered, the excess of the expenses over the revenues for 1958 would amount to $1,704,487.28. There were 12,991 shipments accorded mechanical protective ser-

vice in 1958, equivalent to a loss per shipment of $86.27, excluding interest and Federal income taxes, or $131.21 per shipment including those factors. Comparable losses for 1957 and the first 9 months of 1959, were, respectively: $88.17 and $136.18; and $55.65 and $124.49. The proprietary railroads indicate a willingness to revise the present basis of compensation to eliminate the losses from mechanical protective services.

As shown in appendix E, the heater operations resulted in large deficits for 1958 and 1959. To support the El Paso contract, an exhibit was submitted which shows the unit cost based on the 1958-59 heater season as $1.77. The unit charge for the 1959-60 heater season was $1.75.

American Refrigerator Transit.—The stock of this company (hereinafter called ART) is owned jointly by the Missouri Pacific Railroad (71 percent) and the Wabash Railroad Company (29 percent). In addition to contracts with its proprietary companies, ART has contracts with the Denver & Rio Grande Western Railroad Company and the Texas & Pacific Railway Company. The contract with the Wabash covers only inspections of mechanical refrigerator cars at Council Bluffs and Omaha. The ART does not include a profit element in its contract charges for protective services, and the basic contracts between it and the railroads provide for adjustments at the end of the year whereby it receives from the railroads payments sufficient to make it whole if the protective services result in a loss, or it pays to the railroads any excess over its costs. In addition ART furnishes mechanical refrigeration services under division sheet 7. No yearend adjustments are made in connection with services performed thereunder. The various items of expense comprising the costs for furnishing mechanical refrigeration units, inspection thereof, as well as

the furnishing of nonmechanical protective services, for the described railroads were submitted. In 1958 the total expenses, including 6 percent return on investment, incurred in rendering mechanical protective services exceeded the revenues therefrom by $2,283 and in the first 9 months of 1959 the expenses, excluding the 6-percent return, exceeded the revenues by $2,846. In the absence of yearend adjustments with respect to service performed under the division sheet, ART admits that an effort should be made to eliminate any existing deficits from such services. With respect to nonmechanical refrigeration services, evidence was submitted showing that the costs equaled the charges.

Merchants Despatch Transportation Corporation.—The New York Central Railroad Company performs much of its own protective service. However, it receives protective services through Merchants Despatch Transportation Company (Despatch), a wholly owned subsidiary. City Products Corporation, an independent company, performs inspections of mechanical units in mechanical refrigerated cars at the five regular icing stations on the lines of The New York Central system located at Wayneport and East Buffalo, N.Y., Windsor, Ontario, Canada, and Airline Junction and Bellefontaine, Ohio, under a contract with Despatch. At the time of the initial hearing in this proceeding, it made a charge of $1.50 per inspection which was paid by Despatch. However, Despatch did not cross-bill the New York Central but added the charges paid to City Products Corporation to the cost of inspecting so-called non-icers and averaged the inspection costs for the purpose of ascertaining the charges to be made to the New York Central. In addition, it performs various other accounting services relating to protective services furnished by other contracting entities, as well as nonmechanical protective services.

The basic contract between Despatch and the New York Central provides that the charges made by the former shall be based on cost, and adjustments are made at the end of an operating year to make Despatch whole in the event that it operates at a loss or to return to the New York Central and charges in excess of cost.

M. J. Schiffer Company.—The Illinois Central has an unapproved contract with this company, with which it has no affiliation, to perform the following services at Waterloo, Iowa: ice cars; inspection and adjustment of ventilating devices; place heaters in or remove heaters from cars, and inspect and service heaters already in cars passing through Waterloo; and inspect, log, and report operation and indicator readings on mechanically refrigerated cars passing through Waterloo. For these services the railroad pays the Schiffer Company:

1. $3.35 per ton of ice placed in bunkers, but if the total tonnage in 1 calendar month is 1,500 tons or more, the rate per ton will be reduced to $2.35 for such calendar month;

2. $0.40 for inspecting and adjusting ventilating devices and for inspecting cars under refrigeration for which no ice is supplied;

3. $2.40 for installing, removing, inspecting, and looking after heaters installed in cars and $0.65 for each heater in cars passing through or removed at Waterloo that were inspected or looked after by the contractor; and

4. $0.40 per car for inspecting, logging, and reporting operation of mechanically refrigerated cars.

During the first 6 months of 1959 the Schiffer Company inspected 729 mechanically refrigerated cars for $291.60 and 18,605 other cars for $6,442; 1,873.65 tons of ice were placed in bunkers for $6,276.74; 3,057 heaters were inspected for $1,987.05; and 101 heaters were installed for $242.40.

The total cost to the Illinois Central for this 6-month period amounted to $16,239.79.

Discussion and conclusions.—It is clear from the foregoing that none of the charges for mechanical refrigeration services yield the costs of rendering such services. This is attributed to the fact that such services have been experimental. FGE made only a small profit from its overall protective services and BRE, WFE, and PFE failed to realize costs from such services. ART and Despatch, as to the services rendered under their contracts with their proprietary companies, neither operate at a loss nor a profit. As indicated, however, it is not possible on this record to ascertain from the evidence of unit costs submitted by FGE, BRE, and WFE to determine what unit prices would be compensatory. Similarly, it cannot be determined what changes in the provisions of the division sheet would make the carline companies whole in the performance of mechanical protective service under that sheet.

In the initial report herein, supra, at page 155, division 3, in connection with its conclusion that the car-line companies should bill each individual road for the services it renders to it on the basis of cost plus a reasonable profit of about 6 percent, "recognized, also, that it will be necessary, for practical purposes, to arrive at costs to some extent by an averaging process, without meticulous regard for individual conditions." Obviously, there is no basis for not approving the presently unapproved contracts of respondents because of excessive charges. The question arises whether such contracts, including division sheet 7, may not be approved to the extent the charges set forth therein fail to yield costs. In the report on further hearing in this proceeding, 253 I.C.C. 21, in which certain contracts were approved, division 3 said, at pages 41 and 42:

> It appears that the unit prices stated in these contracts will yield the car-line company less than the cost for such repairs to all of its cars which are used by the carriers concerned. However, the provisions of section 1(14)(b) contemplated only that the charges which the carriers pay shall be no more than reasonable. The information at hand indicates that the charges here in issue are not unreasonable.

See also the third supplemental report, 255 I.C.C. 729, 732.

At the times the cited cases were decided the car-line companies were not rendering mechanical refrigeration services and therefore the financial results of their overall protective services were not affected in the same manner as they now are by the substantial losses incurred in rendering such services. We recognize that the total operations of the car-line companies are profitable and that any losses incurred in the rendering of protective services are absorbed by profits from the car-line companies' car service operations. However, we are of the view that such a situation is not desirable. Considering the circumstances hereinbefore described, as well as matters hereinafter discussed, it is clear that further guidelines are necessary to insure that the provisions of contracts covering protective services submitted to us for approval and the charges made thereunder are just and reasonable and consistent with the public interest. Before setting forth such guidelines, we will discuss the procedures followed in the past and those which we shall require in the future in the filing of contracts and supplements to contracts and in our approvals thereof.

As a result of the original report herein, the Commission required the carriers to file with it copies of contracts showing the charges for individual services such as are shown in appendixes B, C, and D. This has been done by the

carriers for a number of years and because of the consistent increases in labor, materials, and other expenses, numerous supplements to contracts have been filed for approval, in some instances almost yearly since 1956. Because of the absence of information concerning the compensatory nature of charges covering mechanical refrigeration, and later because of the pendency of this proceeding, numerous contracts filed with us have not been approved or disapproved. In addition, a number of contracts or supplements to contracts have been filed since the conclusion of the hearing in this case, none of which have been acted on. As indicated above, the record here does not supply the necessary information to support approval of many of the contracts. Contracts, or amendments to contracts, on file with the Commission, as of May 1, 1962, are listed in appendix F hereto.

It is generally agreed that it would be desirable from the standpoints of the railroads, the protective service companies,[2] and the Commission if a more elastic procedure, within the purview of section 1(14)(b), were adopted, whereby the charges could be modified as required by current conditions and applied without having first obtained approval from us.We have given this matter lengthy consideration and have concluded that the following procedure will be in the interest of better administration.

In order that the railroads shall not be in the position of operating in the future under unapproved contracts, we shall approve all of the contracts now before the Commission for approval upon the condition that parties thereto comply with the requirements hereinafter set forth.

All rail carriers and express companies receiving protective services under any contracts, agreements, or arrange-

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2. The term "protective service companies" includes car-line companies and independent companies performing protective services for railroads.

ments requiring approval under section 1(14)(b) of the Interstate Commerce Act shall submit for approval within 120 days after the effective date of the order herein, new or superseding contracts covering protective services which shall replace all prior contracts, including division sheet 7. Compare the initial report herein, supra, page 157. The provisions of the new or superseding contracts shall be in accord with the requirements hereinafter set forth. Such contracts shall include general provisions applicable to all of the charges for protective services and shall remain in effect until canceled by the parties or required to be modified by the Commission. No schedules of specific charges for specific services need be included as part of the contracts. Submission and approval of such contracts will authorize the railroads to pay without prior approval charges for new services or revised charges for present services. The present charges should be revised immediately in accord with the requirements hereinafter set forth. In order to determine that the actual charges made and collected under the contracts are in conformity with the regulations hereinafter prescribed, we will from time to time examine the annual reports and office records of the railroads and protective service companies.

The contracts to be filed shall be drawn so as to comply with the following:

> 1. The charge for each protective service shall yield to the person performing such service no less than the cost of performing the service, the cost to be determined as set forth below.

Charges assessed the railroads by protective service companies ultimately are borne either directly or indirectly by the shippers. We have on occasions approved charges paid by the shippers to the railroads for protective services

which were less than the cost of the railroads of performing such services, principally because of competitive situations. Nevertheless, the railroads must make up such losses from other rates and charges collected for other services rendered the shippers. In order to avoid the placing upon one protective service the burden of helping to support another protective service, it is desirable that the charge for each protective service be sufficient to cover the costs of rendering that service. This also applies to services performed under division sheet 7. Nine years have elapsed since mechanical refrigeration services were established. Such services can no longer be considered as experimental. If protective service charges are constructed so they will yield costs there would be no need for the profitable car services operations to absorb deficits from protective service operations. The described operations are regulated under different provisions of the Interstate Commerce Act, and division 3 in the original report herein required that the charges for the respective services be set forth in separate contracts or separate sections of a contract. In like manner, the charges of each should be set according to the expenses of each.

> 2. A charge for a protective service may include, in addition to cost, a reasonable profit not in excess of 6 percent of the book cost of the property and equipment employed in furnishing the service, less the related accrued depreciation, plus a reasonable allowance for working capital.

We recognize that while the car-line companies are wholly owned subsidiaries of their respective parent railroads, they require funds for various purposes such as the replacement or expansion of facilities and equipment. We conclude that a 6-percent profit is not contrary to the public interest

and should be the maximum profit to be received by any person rendering protective service.

> 3. (a) The costs shall be based upon the best information available, which shall include expected future increases or decreases in labor, materials, and other expenses, and may be based upon prior operations to the extent that conditions, expenses, and practices are expected to remain the same.

In many instances in the past, the car-line companies have based their unit prices upon the cost incurred during the preceding year. We do not condemn that practice but believe that consideration should be given to foreseeable future expenses.

> (b) The cost may be that incurred by the person rendering a specific protective service for a specific railroad, or express company, or it may be the average cost of rendering a specific service for all railroads and express companies served by said person.

The alternative provision in (b) concerning average costs is in accord with the views previously expressed by division 3, quoted above, should assist both the persons rendering the protective services and the railroads in arriving at just and reasonable charges, and is consistent with the public interest.

> 4. In the event the person rendering the protective services shall not recover costs for any service rendered, such person shall bill the railroads and express companies receiving those services, on a proportionate basis, for the amount of the loss. In the event the profit for any service received by such person exceeds a reasonable amount, the person rendering the service shall refund the excessive amount, on a proportionate basis, to the railroads and express companies involved. These adjustments are to be made as soon as practicable after

the end of each calendar year. In determining the need for adjustments, each item or service for which a unit price has been charged shall be independently considered.

As hereinbefore shown, the greatest variable in costs is the volume of service units performed in any one year. Thus, although charges based on estimated costs which in turn are based on the volume performed in the preceding year may be within the requirements set forth herein, a change in volume may result in the charges yielding revenues less than cost or more than cost plus 6 percent return. The above requirement is necessary to provide for adjustments in such cases.

5. No contract shall provide for a charge to a nonproprietary railroad or express company different from that to a proprietary railroad for the same service under substantially similar conditions.

The unit charges made by the three commonly managed car-line companies to nonproprietary companies are 10 percent higher than those charged their proprietary companies. No sound cost basis has been submitted justifying that practice.

6. Contracts for protective services may be between one or more persons rendering protective services, on the one hand, and, on the other, one or more railroads and express companies, provided that the contracts are consistent with the regulations herein.

This provision will avoid a multiplicity of contracts and at the same time provide for the establishment and payment of charges, on the bases set forth above, without further action by the Commission.

FINDINGS

We find that the unapproved contracts covering protective services, set forth in appendix F hereto, are just and reasonable, provided that, within 120 days after the service of this report and the order herein, the railroads shall file new or superseding contracts consistent with the regulations set forth in appendix G hereto. In the event new or superseding contracts are not filed, further consideration will be given to the issuance of an order finding the presently unapproved contracts not within the requirements of section 1(14)(b).

We further find that the regulations set forth in appendix G hereto are, and contracts filed in accord therewith will be, just and reasonable and consistent with the public interest. An appropriate order will be issued.

COMMISSIONER FREAS, dissenting in part:

I am unable to agree with the action of the majority to the extent that they approve the outstanding contracts.

APPENDIX A

Railroads with standard form contracts, December 31, 1959

FRUIT GROWERS EXPRESS COMPANY:

PROPRIETARY LINES

Alabama Great Southern Railroad.
Atlantic Coast Line Railroad.
Baltimore & Ohio Railroad.
Central of Georgia Railway.
Chesapeake & Ohio Railway.
Chicago & Eastern Illinois Railroad.
Cincinnati, New Orleans & Texas Pacific Railway.
Florida East Coast Railway.
Georgia Southern & Florida Railway.
Louisville & Nashville Railroad.
New Orleans & Northeastern Railroad.
New York, New Haven & Hartford Railroad.
Norfolk & Western Railway.
Norfolk Southern Railroad.
Pennsylvania Railroad.
Richmond, Fredericksburg & Potomac Railroad.
Seaboard Air Line Railroad.
Southern Railway.

SUBSIDIARIES OF PROPRIETARY LINES

Atlanta & West Point Rail Road.
Atlantic & East Carolina Railway.
Baltimore & Eastern Railroad.
Carolina & Northwestern Railway.
Charleston & Western Carolina Railway.
Clinchfield Railroad.
Columbia, Newberry & Laurens Railroad.
East Carolina Railway.
Gainesville Midland Railroad.
Georgia Railroad.
Kentucky & Indiana Terminal Railroad.
Live Oak, Perry & Gulf Railroad.
Long Island Railroad.
New Orleans Terminal Company.
Pennsylvania-Reading Seashore Lines.
Rockingham Railroad.
Staten Island Rapid Transit Railway.
Tallulah Falls Railway.
Tavares & Gulf Railroad.
Virginia & Carolina Southern Railroad.
Western Railway of Alabama.
Winston-Salen Southbound Railway.
Wrightsville & Tennille Railroad.

NONPROPRIETARY LINES

Aberdeen & Rockfish Railroad.
Albany & Northern Railway.
Atlanta & St. Andrews Bay Railway.
Atlantic & Danville Railway.
Beaufort & Morehead Railroad.
Boyne City Railroad.
Carolina Southern Railway.
Coudersport & Port Allegany Railroad.
Durham & Southern Railway.
Georgia & Florida Railroad.
Georgia, Ashburn, Sylvester & Camilla Railway.
Georgia Northern Railway.
Hampton & Branchville Railroad.
Laurinburg & Southern Railroad.
Maryland & Pennsylvania Railroad.
Monon Railroad.
Monongahela Railway.
Piedmont & Northern Railway.
Savannah & Atlanta Railway.
Stewartstown Railroad.
Tennessee, Alabama & Georgia Railway.
Washington & Old Dominion Railroad.

WESTERN FRUIT EXPRESS COMPANY:

PROPRIETARY LINE

Great Northern Railway.

BURLINGTON REFRIGERATOR EXPRESS COMPANY:

PROPRIETARY LINE

Chicago, Burlington & Quincy Railroad.

SUBSIDIARIES OF PROPRIETARY LINE

Colorado & Southern Railway.
Fort Worth & Denver Railway.

Railroads under contract for mechanical protective services with Pacific Fruit Express as of December 31, 1959

PROPRIETARY LINES

Union Pacific Railroad.
Southern Pacific Railroad.

SUBSIDIARIES OF PROPRIETARY LINES

Holton Inter-urban Railway.
Texas and New Orleans Railroad.
Northwestern Pacific Railroad.
Pacific Electric Railway.
Petaluma and Santa Rosa Railroad.
San Diego and Arizona Eastern Railway.
Visalia Electric Railroad.
Yakima Valley Transportation.

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NONPROPRIETARY LINES

Western Pacific Railroad.

SHORT LINE CONNECTIONS OF CONTRACT LINES

Bamberger Railroad.
California Western Railroad.
Camas Prairie Railroad.
Central California Traction Company.
City of Prineville Railway.
Great Western Railway.
Longview, Portland and Northern Railway.
Los Angeles Junction Railway.
Modesto and Empire Traction Company.
Mount Hood Railroad.
Oregon, California and Eastern Railway.
Portland Traction Company.
Sacramento Northern Railway.
Santa Maria Valley Railroad.
Sierra Railroad.
Stockton Terminal & Eastern Railroad.
Sunset Railway.
Tidewater Southern Railway.
Trona Railway.
Union Railroad of Oregon.
Ventura County Railway.
Walla Walla Valley Railway.

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(Appendices B through E (318 I.C.C. 130-132) are omitted since they are simply tabular compilations of financial data. They are entitled as follows:

Appendix B—Fruit Growers Express—Proprietary Unit Prices as of January 1, 1959

Appendix C—Western Fruit Express—Proprietary Unit Prices as of January 1, 1959

Appendix D—Burlington Refrigeration Express Company—Proprietary Unit Prices as of January 1, 1956

Appendix E—Pacific Fruit Express Company—Analysis of Operations for Years Ended December 31, 1958 and 1959)

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APPENDIX F

Unapproved contracts and supplements by car-line companies as of August 27, 1962

Unless otherwise stated, the latest contracts or supplements are those listed by effective dates shown below and supersede all previous contracts or supplements to which reference is made in this memorandum. Original contracts are designated by "(O)"; supplements are designated by "(S)." The number of previous contracts or supplements superseded by the latest are contained in the figure in parentheses. Also, unless otherwise shown, each contract or supplement covers both mechanical refrigeration as well as other protective services. If protective services do not include mechanical refrigeration, the contract or supplement is designated as "*"; if only mechanical refrigeration is included, such contract or supplement is designated "**." Subsidiary lines of parent companies are indicated by an abbreviation of the parent company; thus, for example, the Tavares and Gulf Railroad Company is a subsidiary of the Seaboard Air Line Railroad Company and is listed as "Tavares and Gulf Railroad Company (SAL)."

(1) AMERICAN REFRIGERATOR TRANSIT CO.

Chicago, Rock Island and Pacific Railroad Company (O) December 1, 1961*.

The Denver and Rio Grande Western Railroad Company (S) (5) January 1, 1961.

Missouri Pacific Railroad Company (S) (2) January 1, 1962.

St. Louis-San Francisco Railway Company (O) December 1, 1961*.

The Texas and Pacific Railway Company (S) January 1, 1959; January 1, 1961.

Wabash Railroad Company (S) March 1, 1958**; (S) November 15, 1960*; (S) January 17, 1962*.

(2) BURLINGTON REFRIGERATOR EXPRESS CO.

Chicago, Burlington & Quincy Railway Company (S)(1) January 1, 1956.

The Colorado and Southern Railway Company (CB&Q) (S) (1) January 1, 1956.

Fort Worth and Denver Railway Company (CB&Q) (S)(1) January 1, 1956.

(3) CITY PRODUCTS CORP.

Indiana Harbor Belt Railroad Company (S) April 1, 1959*.

(4) FRUIT GROWERS EXPRESS CO.

(NOTE: Superseded supplements of this car-line company bearing effective dates of January 1, 1953, covered only mechanical refrigeration.)

Aberdeen and Rockfish Railroad Company (S)(7) January 1, 1962.

The Alabama Great Southern Railroad Company (SRS) (S)(7) January 1, 1962.

Albany and Northern Railway Company (S)(7) January 1, 1962.

Atlanta & Saint Andrews Bay Railway Company (S) (7) January 1, 1962.

Atlanta and West Point Rail Road Company (S)(6) January 1, 1962.

Atlantic Coast Line Railroad Company (S)(7) January 1, 1962; (O) October 1, 1960**.

The Atlantic and Danville Railway Company (Seaborn J. Flourney, Trustee) (S)(7) January 1, 1962.

Atlanta and East Carolina Railway Company (S)(7) January 1, 1962.

The Baltimore and Ohio Railroad Company (S) (7) January 1, 1962; (O) October 1, 1960**.

Beaufort and Morehead Railroad Company (A. T. Leary, lessee) (S) January 1, 1957.

Boyne City Railroad Company (S)(5) January 1, 1961.

Carolina, Clinchfield and Ohio Railway (S)(7) January 1, 1962.

Carolina and Northwestern Railway Company (SRS)
(S)(7) January 1, 1962.

The Carolina Southern Railway Company
(S) January 1, 1953**.

Central of Georgia Railway Company
(S)(7) January 1, 1962.

Charleston & Western Carolina Railway Company (Adopted by Atlantic Coast Line Railroad Company)
(S)(4) January 1, 1959.

The Chesapeake and Ohio Railway Company
(S)(7) January 1, 1962.

Chicago & Eastern Illinois Railroad Company
(S)(7) January 1, 1962.

The Cincinnati, New Orleans and Texas Pacific Railway Company (SRS)
(S)(7) January 1, 1962.

Columbia, Newberry and Laurens Railroad Company
(S)(7) January 1, 1962.

Coudersport and Port Allegany Railroad Company
(S)(6) January 1, 1962.

Durham and Southern Railway Company
(S)(6) January 1, 1962.

East Carolina Railway (ACL)
(S)(7) January 1, 1962.

Florida East Coast Railway Company
(S)(7) January 1, 1962; (O) October 1, 1960**.

Gainesville Midland Railroad Company
(S)(5) January 1, 1961.

Georgia, Ashburn, Sylvester & Camilla Railway Company
(S)(7) January 1, 1962.

Georgia & Florida Railroad
(S)(7) January 1, 1962.

The Georgia Northern Railway Company
(S)(7) January 1, 1962.

Georgia Rail Road & Banking Company (Georgia Railroad)
(S)(6) January 1, 1962.

Georgia Southern and Florida Railway Company (SRS)
(S)(7) January 1, 1962; (O) October 1, 1960**; (O) May 23, 1961**.

Hampton & Branchville Railroad Company
(S)(7) January 1, 1962.

Illinois Central Railroad Company
(O) August 1, 1957**; (S)(2) September 15, 1959**.

Kentucky & Indiana Terminal Railroad Company
(S)(7) January 1, 1962.

Laurinburg and Southern Railroad Company
(S)(7) January 1, 1962.

Live Oak, Perry & Gulf Railroad Company (SRS)
(S)(7) January 1, 1962.

The Long Island Rail Road Company
(S)(7) January 1, 1962.

Louisville and Nashville Railroad Company
(S)(7) January 1, 1962.

Macon, Dublin & Savannah Railroad Company (Adopted by Seaboard Air Line Railroad Company)
(S)(2) January 1, 1957.

Manistee and Northeastern Railway Company (Now Chesapeake and Ohio Railway Company)
(S) January 1, 1953**.

Maryland and Pennsylvania Railroad Company
(S)(6) January 1, 1962.

Monon Railroad
(S)(6) January 1, 1962.
(Formerly Chicago, Indianapolis & Louisville Railway Company)
(S) January 1, 1953**.

The Monongahela Railway Company
(S)(7) January 1, 1962.

Nashville, Chattanooga & St. Louis Railroad Company
(Now Louisville & Nashville Railroad Company)
(S)(2) January 1, 1957.

New Orleans and Northeastern Railroad Company (SRS)
(S)(7) January 1, 1962.

New Orleans Terminal Company (SRS)
(S)(7) January 1, 1962.

The New York, New Haven and Hartford Railroad Company
(S)(7) January 1, 1962.

New York, Ontario and Western Railway Company (discontinued operations)
(S)(1) January 1, 1956.

Norfolk Southern Railway Company
(S)(7) January 1, 1962.

Norfolk and Western Railway Company
(S)(7) January 1, 1962.

The Pennsylvania Railroad Company
(S)(7) January 1, 1962; (O) October 1, 1960**.

Pennsylvania-Reading Seashore Lines
(S)(7) January 1, 1962.

Piedmont and Northern Railway Company
(S)(7) January 1, 1962.

Reading Company
(S) June 1, 1956**; (S) July 1, 1959*; (O) August 1, 1961.

Richmond, Fredericksburg and Potomac Railroad Company
(S)(6) January 1, 1962; (O) October 1, 1960**; (O) June 1, 1961**; (O) August 1, 1961—executed no effective date.

Rockingham Railroad Company (ACL)
(S)(7) January 1, 1962.

Savannah & Atlanta Railway Company
(S)(6) January 1, 1962.

Seaboard Air Line Railroad Company
(S)(6) January 1, 1961; (O) October 1, 1960**; (O) undated**.

Southern Railway Company
(S)(7) January 1, 1962; (O) October 1, 1960**; (O) May 23, 1961**.

The Staten Island Rapid Transit Railway Company
(S)(7) January 1, 1962.

The Stewartstown Railroad Company
(S)(5) January 1, 1962.

Tallulah Falls Railway Company (No longer common carrier)
(S)(5) January 1, 1960.

Tavares and Gulf Railroad Company (SAL)
(S)(5) January 1, 1960; (O) October 1, 1960**.

Tennessee, Alabama & Georgia Railway Company
(S)(7) January 1, 1962.

Virginia and Carolina Southern Railroad Company (ACL)
(S)(7) January 1, 1962.

The Virginian Railway Company (Adopted by Norfolk & Western Railway Company)
(S)(4) January 1, 1959.

Wabash Railroad Company
(O) September 1, 1961*.

Washington and Old Dominion Railroad
(S)(7) January 1, 1962.
The Western Railway of Alabama
(S)(6) January 1, 1962.
Winston-Salem Southbound Railway Company (ACL)
(S)(7) January 1, 1962.
Wrightsville and Tennille Railroad Company
(S)(7) January 1, 1962.

(5) MAINE POTATO SHIPPERS HEATER SERVICE, INC.

Bangor and Aroostook Railroad Company
(O) November 1, 1960*.
Boston and Maine Railroad
(O) November 1, 1960*.
Maine Central Railroad Company
(O) November 1, 1960*.

(6) MERCHANTS DESPATCH TRANSPORTATION CORP.

The New York Central Railroad Company
(S)(5) January 1, 1961*.

(7) PACIFIC FRUIT EXPRESS COMPANY

Chicago, Rock Island and Pacific Railroad Company
(S) October 13, 1959*.
St. Louis-San Francisco Railway Company
(S)(1) November 1, 1961*.
Southern Pacific Company
(O) January 1, 1960; (S) October 1, 1961.
Union Pacific Railroad Company
(O) January 1, 1960; (S) October 10, 1961.
Wabash Railroad Company
(S)(1) November 1, 1961*.

(8) RUBEL CORP.

Erie-Lackawanna Railroad Company (Formerly Delaware, Lackawanna & Western Railroad Company)
(O) January 7, 1955*.

(9) M. J. SCHIFFER

Illinois Central Railroad Company
(O) December 15, 1958.

(10) JAMES TAYLOR

Illinois Central Railroad Company
(O) January 20, 1960*; (S) June 13, 1960*.

(11) WESTERN FRUIT EXPRESS COMPANY

Great Northern Railway Company
(S) (7) January 1, 1962.

APPENDIX G

TITLE 49—TRANSPORTATION
CHAPTER I—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 165—CONTRACTS FOR PROTECTIVE SERVICES

Ex Parte No. 137

CONTRACTS FOR PROTECTIVE SERVICES

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 27th day of August A.D. 1962.

It appearing, That by orders of October 28, 1958, May 20, 1959, and December 9, 1959, the Commission, by Division 3, instituted this proceeding to determine whether the charges for protective services set forth in certain contracts filed with the Commission are just and reasonable and consistent with the public interest, as provided in section 1(14)(b) of the Interstate Commerce Act, and further to determine whether the Commission's approval, findings, and orders in prior proceedings in Ex Parte No. 137, as they may affect the contracts or amendments thereto filed for approval, should be modified, amended, or changed in any respect, and particularly the 15 percent revision provision approved in 276 I.C.C. 323 at page 325, and the 6 percent profit provision referred to in 246 I.C.C. 145 at page 155;

It further appearing, That all rail carriers having contracts, or amendments to contracts, for protective service on file with the Commission requiring approval pursuant to section 1(14)(b) of the Act, were made respondents and that notice was given to the respondents, and to the public by posting copies of the orders in the Office of the Secretary

of the Commission and by filing a copy with the Federal Register Division, Washington, D.C.;

It further appearing, That hearings were held at Washington, D.C., on October 29, 1959, and January 26 and 27, 1960, at which certain respondents and representatives of persons performing protective services for the railroads appeared; that a report and recommended order of an examiner was issued, to which exceptions were filed; and that an oral argument was had;

And it further appearing, That the Commission, Division 2, has, on the date hereof, made and filed a report in this proceeding containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof: and good cause appearing therefor:

It is ordered, That 49 C.F.R. Part 105, be, and it is hereby, amended by adding thereto the following new section:

Sec. 105.2—*Content of Contracts.*

(a) All rail carriers and express companies receiving protective services under any contracts, agreements, or arrangements requiring approval under section 1(14)(b) of the Interstate Commerce Act shall submit for approval, on or before 120 days after the effective date of this order, new or superseding contracts covering protective services performed under contracts now on file with the Commission as well as those performed under the provisions of Division Sheet 7, "Basis of Divisions Applying in Connection with Charges for Protective Services As Published in Perishable Protective Tariff 16 or Successive Issues Thereof", and supplements thereto. The contracts required herein to be filed shall supersede all prior contracts, including Division Sheet 7, and such contracts and those filed thereafter shall conform in substance to the provisions set forth in subsections (b), (c), (d), (e), (f), and (g).

(b) The charge for each protective service shall yield to the person performing such service no less than the cost of performing the service, the cost to be determined as set forth in (d)(i) and (ii).

(c) The charge for a protective service may include, in addition to cost, a reasonable profit not in excess of 6 percent of the book cost of the property and equipment employed in furnishing the service, less accrued depreciation, plus an allowance for working capital.

(d)(i) The cost shall be based upon the best information available, which shall include expected future increases or decreases in labor, materials, and other expenses, and may be based upon prior operations to the extent that conditions, expenses, and practices are expected to remain the same.

(ii) The cost may be that incurred by the person rendering a specific protective service for a specific railroad or express company, or it may be the average cost of rendering a specific service for all railroads and express companies by such person.

(e) In the event the person rendering the protective services shall not recover costs for any item or service rendered, such person shall bill the railroads and express companies receiving those services, on a proportionate basis, for the amount of the loss. In the event the profit for any item or service received by such person exceeds a reasonable amount, the person rendering the service shall refund the excessive amount, on a proportionate basis, to the railroads and express companies involved. These adjustments are to be made as soon as practicable after the end of each calendar year. In determining the need for adjustments, each item or service for which a unit price has been charged shall be independently considered.

(f) No contracts shall provide for a charge to a nonproprietary railroad or express company different from that to a proprietary railroad for the same service under substantially similar conditions.

(g) Contracts may be between one or more persons rendering protective services, on the one hand, and, on the other, one or more railroads and express companies, provided the contracts are consistent with the provisions of paragraphs (b), (c), (d), (e), and (f) of this section.

It is further ordered, That those contracts now on file with the Commission which have not been approved heretofore, be, and they are hereby approved upon the condition that they shall be superseded by new contracts filed in accord with the above regulations;

And it is further ordered, That this order shall become effective on October 29, 1962.

Notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Division of the Federal Register, Washington, D.C.

Authority: 54 Stat. 901.

By the Commission, Division 2.

HAROLD D. MCCOY,
Secretary.

(SEAL)

Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al,
Petitioners,

vs.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Pacific Fruit Express Company In Opposition

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In the Supreme Court of the United States

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AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al,
Petitioners,

vs.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Pacific Fruit Express Company In Opposition

Respondent PACIFIC FRUIT EXPRESS COMPANY (hereinafter referred to as "PFE") respectfully submits the following brief in Opposition to the Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

1. United States Code, Title 49, Section 16(12) (Interstate Commerce Act, Section 16(12)).
2. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)).
3. United States Code, Title 28, Sections 1336(b) and 1336(c).
4. United States Code, Title 28, Section 2325.

(The text of the listed statutes is set forth in the Appendix hereto.)

QUESTIONS PRESENTED

1. In an action before a single judge to enforce an order of the Interstate Commerce Commission under 49 U.S.C. Sec. 16(12), may petitioners (for the first time in this action) challenge the power of the Commission under 49 U.S.C. Sec. 1(14)(b) to make its order, thereby circumventing review by a three judge court in the District of Columbia, which currently has before it the identical question?

2. Assuming petitioners may now question the power of the Commission, could the Commission, under Sec. 1(14)(b), which makes unapproved protective service arrangements between railroads and carlines unlawful without Commission approval, require that an arrangement to which all petitioners were parties be superseded by new arrangements meeting prescribed standards of reasonableness?

STATEMENT OF THE CASE

This is an action to enforce an order of the Interstate Commerce Commission issued in 1962 in an investigation of mechanical protective service contracts entitled Ex

Parte No. 137, *Contracts for Protective Services*, 318 I.C.C. 111 (1962). (Petitioners' App. H) The District Court issued an injunction under Sec. 16(12) commanding obedience to the 1962 Order and granted judgment in favor of PFE on the issue of petitioners' liability for damages, pursuant to Secs. 8 and 9 of the Interstate Commerce Act (49 U.S.C. Secs. 8 and 9), and on quantum meruit. (Petitioners' App. F) The injunction aspect of the District Court's judgment was unanimously affirmed by the Court of Appeals for the Ninth Circuit on August 28, 1975. (Petitioners' App. B)

Some eleven years after the original order was issued, a number of the petitioning railroads commenced an action in 1973 before a three judge court in the District of Columbia to set aside the Commission's 1962 Order (*Southern Railway Company, et al. v. United States*, Civil No. 1776-73) which has been argued and submitted (the "review action"). PFE is an intervening defendant in that action. Significantly, petitioners have failed to inform this Court that the very issue they now seek to raise is one of the issues before the three judge court in the District of Columbia review action.

PFE's action results from petitioners' pervasive use of PFE's mechanical refrigerator cars and mechanical refrigeration units in those cars for hundreds of thousands of days and millions of miles on the lines of railroad of all the defendants below. Petitioners use PFE's mechanical refrigeration units to supply mechanical protective service to perishables moving on their railroads pursuant to their legal duty as common carriers and their public holding out to do so published in their joint tariffs. PFE's mechanical refrigeration units are serviced and maintained by PFE, and are designed to furnish complete continuous protection to perishables on all railroads over which the refrigerator car moves.

The contractual arrangement by which petitioners pay PFE for mechanical protective service, which was before the Commission in the proceedings leading to its 1962 Order, is known as "Division Sheet 7". Under the provisions of this contract, the railroads agreed among themselves to pay PFE 80% of the revenues derived from shippers for mechanical protective service. This amount was found by the Commission to be inadequate and the railroads were ordered to supersede that arrangement with new contracts meeting various criteria described in that Order.

Petitioners requested the District Court to refer the enforcement action to the Commission, as being within its primary jurisdiction. The District Court thereupon referred a number of questions to the Commission concerning its 1962 Order. In an order arising out of such referral, the Commission responded to the Court's interrogatories in *Contracts-Pacific Fruit Exp. Co. & Akron, C&Y Co.*, 340 I.C.C. 754 (1972). (Petitioners' App. E) Insofar as pertinent to the present petition, the Commission found:

1. That PFE furnished protective service within Sec. 1(14)(b) to all railroads participating in movements of perishables, irrespective of their status as originating, intermediate or terminating railroads.

2. That Sec. 1(14)(b), and the 1962 Order, requires the furnishing of mechanical protective service by PFE to the railroads to be covered by contracts which must be submitted to the Commission for approval.

3. That the arrangement then in effect between the railroads and PFE (i.e., Division Sheet 7) must be superseded by new contracts which conform with the criteria set forth in the 1962 Order.

4. That any railroad, whether originating, intermediate or terminating, that fails to enter into and file its arrangements for receiving mechanical protective service was and is in violation of Sec. 1(14)(b) and the Commission's 1962 Order.

Petitioners did not seek review of the 1972 Order in the District Court and, indeed, actually embraced it. The Court of Appeals rejected petitioners' later attempt to challenge the 1972 Order, as it was not made in the District Court within 90 days from the date that the ICC order became final, as required by 28 U.S.C. Secs. 1336(b) and (c).

Petitioners have adamantly refused to comply with the Commission's 1962 Order since its inception. They did not raise the question they now seek to present, i.e., the *power* of the Commission under Sec. 1(14)(b) to issue its order, before the Commission, or the courts below.

REASONS FOR DENYING CERTIORARI

I. Petitioners Did Not Raise the Question They Now Claim Is Presented, i.e., Whether Sec. 1(14)(b) "Empowers" the Commission or the Courts to Require Them to Enter Into Mechanical Protective Service Contracts, Either Before the Commission or the Lower Courts.

In the proceedings below, in connection with their argument that PFE did not have a right to have the 1962 Order enforced, petitioners argued that PFE had no relationship with them. Now, faced with findings by the Commission and the courts that such relationship exists and that PFE is an injured party which has the legal right to enforce the 1962 Order, they seek to challenge the Commission's right to exercise its authority under Sec. 1(14)(b). In fact, petitioners expressly disclaimed to the Court of Appeals any intention to attack the authority of the Commission to make the 1962 Order. (Appellant's Reply Brief in the Court of Appeals, page 13.[1]) It is fundamental that petitioners cannot

1. Petitioners made this representation to the Court of Appeals after having mentioned, in passing, the question of the Commission's authority under Sec. 1(14)(b) in their opening brief, and being met with PFE's contention that this and other assertions were improper collateral attacks.

argue on certiorari an issue that was not raised below. See *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1966).

II. The Question Presented by Petitioners Is an Impermissible Collateral Attack on the Commission's Orders.

A party may not attack the validity of a Commission order except before a three-judge court, as prescribed by 28 U.S.C. Secs. 2321-25. This is the exclusive method of reviewing Commission orders, and collateral attack in another proceeding is improper.[2]

In an enforcement action, a Commission order is presumed to be valid, and even an indirect or unexpressed argument that a Commission order is wrong or is invalid is deemed a collateral attack which is precluded by 28 U.S.C. Secs. 2321-25. *B. F. Goodrich Company v. Northwest Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), *cert. den.*, 400 U.S. 822 (1970); *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 398 (5th Cir. 1969), *cert. den.*, 397 U.S. 910 (1970), *reh. den.*, 397 U.S. 1030 (1970); *United States v. Southern Railway Company*, 364 F.2d 86 (5th Cir. 1966), *cert. den.*, 386 U.S. 1031 (1967); *Baltimore & O. R.R. v. United States*, 304 U.S. 58 (1938); *Venner v. Michigan C. R.R.*, 271 U.S. 127 (1926). Moreover, petitioners cannot indirectly attack the Commission's 1972 Order answering the District Court's questions, as they did not comply with 28 U.S.C. Secs. 1336(b) and (c).

III. Petitioners Have Raised the Identical Issue in Their District of Columbia Action to Review the 1962 Order.

The power of the Commission to require petitioners to contract with PFE in accordance with the Commission's

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2. The procedure was changed by Public Law 93-584, 88 Stat. 1918, effective January 2, 1975. Review actions are now heard by the Courts of Appeals.

1962 Order has been raised, thoroughly briefed and argued in the District of Columbia review action. Thus, a denial of this petition will not preclude a resolution of the very issue petitioners improperly attempt to present herein.

IV. The Writ Is Not Needed to Establish Uniformity of Decision.

Petitioners' claim that this Court should assume jurisdiction to establish uniformity of decision is not well founded. The merits of the Commission's actions in 1962 which petitioners are attempting to present in this enforcement action are at issue in the District of Columbia review action, and that is the proper court to make the determination, in the first instance. Petitioners state that a number of other carlines furnishing mechanical protective service to railroads have commenced similar actions. These actions, which also seek recovery on the basis of the 1962 Order, were filed after the District Court's judgment in PFE's favor. All of them have been stayed pending resolution of the review action.

V. The Commission, Under Sec. 1(14)(b), Was Clearly Authorized to Consider the Reasonableness of Petitioners' Arrangement to Compensate PFE for MPS, and to Order That It Be Superseded.

Although the petition should be denied for the reasons previously stated, we will also state briefly our position regarding the powers of the Commission under Sec. 1(14)(b).

Petitioners claim that Sec. 1(14)(b) gives the Commission only the power to approve what is submitted to it, without more (Petition, page 15). By their own admission (Petition, page 10) Division Sheet 7, to which the petitioners were parties, was before the Commission, and the Commission found that it was an arrangement for provid-

ing MPS, yet the petitioners assert that the Commission created, and the lower courts have enforced, contractual obligations between petitioners and PFE which did not previously exist. This is not correct. Petitioners were ordered by the Commisison and the courts to supersede their contract, Division Sheet 7, and enter into new contracts complying with the 1962 Order. The Commission's power flowed directly from Sec. 1(14)(b), which states that it is "unlawful" for a railroad to have a protective service arrangement "unless and until" it is submitted to and approved by the Commission. Under the statute, as well as the 1962 Order, petitioners were compelled to submit their contracts to the Commission. There is no significant issue of federal law to be resolved by this Court because the action of the Commission in requiring that an existing and inadequate protective service arrangement be superseded and the decisions of the lower courts requiring obedience to the Commission order were clearly authorized. The Commission did not create obligations which did not exist; it merely ordered that existing arrangements be placed on a proper basis.

Contrary to petitioners' claim that Sec. 1(14)(b) is "limited" and "narrow" (Petition, pages 13-14), its legislative history supports the broad scope of the Commission's power. In its 45th Annual Report to the Congress (1931), the Commission recommended that it be given "adequate supervision and control over the arrangements for service and compensation" between railroads and carline companies. The Commission continued to urge Congress to give it supervision and control over protective service and compensation, and in 1940 it submitted statutory language which was adopted by Congress in enacting Sec. 1(14)(b). Immediately thereafter, the Commission entered an order

construing broadly its grant of power under Sec. 1(14)(b) by requiring all railroads to file copies and obtain approval of all their protective service contracts or arrangements, written or unwritten. (See Ex Parte No. 137, *Contracts for Protective Services*, 246 I.C.C. 145, 146 (1941)). This early construction of Sec. 1(14)(b), which has been followed consistently by the Commission through the years, is entitled to great weight. *U.S. v. Amer. Trucking Ass'ns.*, 310 U.S. 534, 549 (1940). Therefore, the Commission not only had the power in 1962 to consider the contracts submitted, but also had the power to remedy violations of Sec. 1(14)(b). *United States v. B. & O. R. Co.*, 333 U.S. 169 (1948); *Baltimore & O. R. Co. v. United States*, 20 F.Supp. 273 (S.D.N.Y. 1937), *aff'd*, 305 U.S. 507 (1939).

The cases cited by petitioners (*I.C.C. v. Oregon-Washington R. Co.; St. Joe Paper Co. v. Atlantic Coastline R. Co.;* and *Neisloss v. Bush*) (Petition, page 15) are not in point. They involved the Commission's totally different authority under Sec. 1(18) of the Interstate Commerce Act to approve a voluntary application to construct a railroad, and under Sec. 5 to approve various types of control by one carrier of another, pursuant to their voluntary agreement. The crucial distinction is that under both Secs. 1 and 5, carriers are not required to undertake line extensions or to enter into control agreements, whereas they are required to submit their protective service arrangements to the Commission under Sec. 1(14)(b).

Sec. 1(14)(a) is also mistakenly relied on by the petitioners. That section confers upon the Commission certain authority over car service, not protective service. This Court has refused to limit the Commission's power under a particular section because other sections of the Act specify its authority in more detail in other situations.

American Trucking v. A., T. & S.F. R. Co., 387 U.S. 397 (1967); *United States v. Pennsylvania R. Co.*, 323 U.S. 612 (1945).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: December 17, 1975.

Respectfully submitted,

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(Appendix Follows)

Appendix

Statutes Involved

1. United States Code, Title 49, Section 16(12) (Interstate Commerce Act, Section 16(12)).

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

2. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)).

> "It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination

with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941."

3. United States Code, Title 28, Sections 1336(b) and 1336(c).

"(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final."

4. United States Code, Title 28, Section 2325. (Repealed effective January 2, 1975.)

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL., PETITIONERS

v.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D-1 to D-12) is reported at 524 F.2d 1025. The opinion of the district court (Pet. App. C-1 to C-17) is reported at 355 F. Supp. 700.

JURISDICTION

The judgment of the court of appeals (Pet. App. B-1) was entered on August 28, 1975. The petition for a writ of certiorari was filed on November 25, 1975. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether petitioners may properly raise the question of the validity of an Order of the Interstate Commerce Commission in this action for the enforcement of that Order.

(2) Whether Section 1(14)(b) of the Interstate Commerce Act, 49 U.S.C. 1(14)(b), empowers the Commission to require intermediate and terminating railroad carriers to modify and submit for approval the contractual arrangements by which they have been compensating a company that provides them with mechanical protective services.

STATUTES INVOLVED

28 U.S.C. 2325 provided (see n. 4 at p. 8, *infra*):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Section 1(14)(b) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(14)(b), provides:

> It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as

just, reasonable, and consistent with the public interest: *Provided,* That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

STATEMENT

By order dated October 28, 1958, the Interstate Commerce Commission (the "Commission") instituted an investigation to determine the reasonableness of charges contained in various contracts filed with the Commission governing the use of mechanical refrigeration units for the protection of perishable freight. By supplemental order dated December 9, 1959, the scope of the investigation was broadened to include the justness and reasonableness of all charges for mechanical protective services against heat or cold contained in contracts that required the approval of the Commission pursuant to Section 1(14)(b) of the Interstate Commerce Act, 49 U.S.C. 1(14)(b) (*Contracts for Protective Services,* 318 I.C.C. 111-112; Pet. App. H-2). All of the petitioner railroads were made respondents in that proceeding.

At the time that the proceeding was instituted, all the petitioners were parties to a contractual arrangement referred to as "Division Sheet 7." This established the formula employed by railroad carriers to pay for the use of mechanical protective services furnished by car line companies with whom they did not have a contract setting forth specific charges for such services (*Contracts, supra,* 318 I.C.C. at 114; Pet. App. H-6). All the petitioners then used Division Sheet 7 as the basis for payments for protective services to respondent Pacific Fruit Express Company, one of several such car line companies.

The Commission found that none of the charges for mechanical refrigeration services yielded the costs of rendering such services (*Contracts, supra,* 318 I.C.C. at 123; Pet. App. H-20). Accordingly, the Commission ordered the filing of new or superseding contracts containing certain charge provisions to insure that the companies furnishing protective services would receive not less than the cost of the services rendered (*Contracts, supra,* 318 I.C.C. at 138; Pet. App. H-41). In its Order of August 27, 1962, the Commission specifically provided that new protective service contracts superseding all contracts then on file with the Commission and Division Sheet 7 were to be filed within 120 days. The Order also provided that a person furnishing such services at a loss under the new contracts should bill the railroads on a proportionate basis for its unrecaptured costs (Pet. App. C-5). None of the petitioners complied with that Order.

On December 30, 1965, respondent Pacific Fruit Express Company instituted this action against the petitioners and other non-complying railroads to recover damages allegedly sustained by Pacific Fruit because of the railroads' failure to pay the proportionate share of its losses in providing mechanical protective services, which, under the terms of the contracts mandated by the Commission, they were obligated to pay.

By orders dated November 16, 1971, and January 20, 1972, the district court referred certain questions within the primary jurisdiction of the Commission to that agency for interpretation of its August 27, 1962 Order. The Commission's responses were contained in a declaratory order decided February 28, 1972 (*Contracts-PFE,* 340 I.C.C. 754; Pet. App. E-1 to E-39). The Commission found that Pacific Fruit was supplying protective service for the refrigeration of perishable commodities

within the meaning of Section 1(14)(b) to all railroad carriers participating in the movement of those commodities, regardless of whether the carriers were originating, intermediate or terminating carriers (*Contracts-PFE, supra,* 340 I.C.C. at 766-768; Pet. App. E-25, E-26, E-28). The Commission also found that under its Order, all carriers, including terminating and intermediate carriers such as petitioners, were required to enter into contracts with Pacific Fruit and to submit those contracts to the Commission for its approval (*Contracts-PFE, supra,* 340 I.C.C. at 770; Pet. App. E-31). Under the terms of that Order, those new, required contracts would have superseded Division Sheet 7 (*Contracts-PFE, supra,* 340 I.C.C. at 769; Pet. App. E-30). The Commission further determined that the failure of the intermediate and terminating carriers to enter into new contracts with Pacific Fruit was a violation of Section 1(14)(b) and its 1962 Order (*ibid.*).

Petitioners did not seek to set aside the Commission's declaratory order in the district court; therefore, as the court of appeals found (Pet. App. D-11), under the provisions of 28 U.S.C. 1336(b) and (c), they are now barred from challenging that order (Pet. App. D-11).[1]

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[1]28 U.S.C. 1336 provides in pertinent part:

* * * * *

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

On April 28, 1972, Pacific Fruit amended its complaint to include a cause of action for a mandatory injunction compelling the defendant railroads to execute contracts with Pacific Fruit of the type required by the Commission in its 1962 Order.[2] On December 11, 1972, the district court granted Pacific Fruit summary judgment on petitioners' liability for damages and granted the joint motion of Pacific Fruit and the Commission for injunctive relief.[3] On March 7, 1973 the court entered its Judgment and Order requiring the defendant railroads to comply with the Commission's Order of August 27, 1962 (Pet. App. F-1 to F-4). On appeal, the court of appeals unanimously affirmed the judgment of the district court (Pet. App. D-1 to D-12).

ARGUMENT

Petitioner railroads challenge (Pet. 13) the authority of the Interstate Commerce Commission to require intermediate and terminating carriers to comply with the provisions of Section 1(14)(b). The question of the validity of the Commission's Order with respect to such carriers was not raised in the courts below and therefore is not properly before this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. Furthermore, the validity of the Commission's

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[2]The amended complaint added the Commission and the United States as defendants. The Commission was dismissed as a party defendant by stipulation; on July 21, 1972, it moved to intervene as a plaintiff pursuant to Section 16(12). 24 Stat. 384, as amended, 49 U.S.C. 16(12). Similarly, on September 27, 1972, the United States moved to be realigned as a plaintiff. The district court granted these motions.

[3]The district court did not determine the amount of damages but expressly reserved that issue for later hearings (Pet. App. C-15). The court of appeals had jurisdiction of the appeal under 28 U.S.C. 1292(a)(1).

Order could not have been raised in the district court, since the single-judge district court lacked jurisdiction to set aside an order of the Commission. Finally, petitioners' assertion (Pet. 10) that Section 1(14)(b) does not apply to intermediate or terminating carriers, as distinguished from originating carriers, is erroneous. Section 1(14)(b) gives the Commission plenary authority over protective service arrangements.

1. The instant case began as an action for damages before a single-judge district court, arising out of the failure of petitioners and other railroads to observe the requirements of the Commission's 1962 Order. The complaint was subsequently amended to include a demand for injunctive relief to compel the defendant railroads to observe those requirements in the future. At no time did any party to this action seek to review or set aside the Commission's 1962 Order; petitioners merely contended in the courts below that since they had no contractual arrangement with Pacific Fruit, the 1962 Order did not require them to enter into a superseding contract. Thus, the validity of the application of that Order to intermediate and terminating carriers was not presented to the courts below and is not properly before this Court.

In any event, at the time this action was instituted, an application to set aside any part of an order of the Commission could only have been heard and determined by a three-judge district court pursuant to 28 U.S.C. 2325. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 309-310 n. 12. The single-judge court would have lacked

jurisdiction to consider such a claim,[4] and the court of appeals would have lacked jurisdiction of the appeal under 28 U.S.C. 1253. *Venner* v. *Michigan Central R. Co.*, 271 U.S. 127, 130-131; *B.F. Goodrich Co.* v. *Northwest Industries, Inc.*, 424 F.2d 1349, 1352-1353 (C.A. 3), certiorari denied, 400 U.S. 822. It is settled that the power of the Commission to issue an order cannot be collaterally attacked as a defense to an enforcement action brought before a single-judge district court. *E.g., Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F.2d 387, 398-400 (C.A.5), certiorari denied, 397 U.S. 910; *United States* v. *Southern R. Co.*, 364 F.2d 86 (C.A. 5), certiorari denied 386 U.S. 1031; see *Aberdeen & Rockfish R. Co.* v. *SCRAP, supra*, 422 U.S. at 308 n. 11. Accordingly, petitioners' belated challenge to the validity of the Commission's 1962 Order as applied to intermediate and terminating carriers does not warrant review.

Futhermore, after the district court had granted summary judgment against them in this litigation, several of the petitioning railroads instituted an action challenging the validity of the Commission's 1962 Order before a three-judge district court, where the case has been argued and is now pending decision. *Southern Ry. Co., et al.* v. *United States*, No. 1776-73 (D. D.C.). Thus, the issue that petitioners seek to litigate before this Court is cur-

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[4] 28 U.S.C. 2325 formerly provided:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

This statute was repealed by Pub. L. 93-584, 88 Stat. 1917, which provided that review of Commission orders in actions brought after February 28, 1975, must be sought in the courts of appeals for the various circuits.

rently being litigated in the proper forum, and any rights that petitioners have will be protected adequately in that action.

2. Petitioners suggest (Pet. 15) that Section 1(14)(b) of the Act gives the Commission the power to approve protective service arrangements submitted for its approval, but grants it no corresponding power to compel carriers to enter into such an arrangement where none existed previously. Assuming *arguendo* that this statutory construction is proper, we believe this argument to be irrelevant to this case.

Common carriers by rail are required to provide protective services for perishable goods. See Sections 1(3)(a) and 1(4), 49 U.S.C. 1(3)(a) and (1)(4); *United States* v. *Fruit Growers Express Co.*, 279 U.S. 363. Under the Commission's rules and regulations, 49 C.F.R. 1032.1, any protective services furnished to or on behalf of a railroad must be covered by a written contract (*Contracts-PFE, supra*, 340 I.C.C. at 766-767; Pet. App. E-26). See H.R. Rep. No. 2016, 76th Cong., 3d Sess. 60 (1940). Section 1(14)(b) requires that all such contracts or arrangements must be submitted to and approved by the Commission. At all relevant times, petitioners were parties to Division Sheet 7 (Pet. 10), an arrangement under which they paid and continue to pay compensation for mechanical protective services provided by Pacific Fruit.[5] That arrangement was subject to the requirements of Section 1(14)(b)

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[5]Division Sheet 7 was an agreement among substantially all the nation's railroads which governed the division of revenue collected by the railroads for mechanical protective services under their respective tariffs (Pet. App. D-4). The courts below adopted the Commission's determination that Division Sheet 7 had not been officially filed with it for approval at the time of its August 27, 1962 Order (Pet. Apps. D-8, E-26), although that agreement was specifically embraced in the terms of that Order.

even though it had not been filed properly with the Commission. Under its 1962 Order, the Commission required these carriers to enter into new contracts that would supersede Division Sheet 7 and specified certain prerequisites that had to be included therein before its approval would be given. Thus, petitioners' duty to enter into superseding arrangements arose not only from the 1962 Order, but from the statute itself.

While petitioners assert (Pet. 14) that the power conferred by Section 1(14)(b) is "narrow," the legislative history of the statute supports a broad construction of the Commission's power over protective service contracts or arrangements. Beginning with its 45th Annual Report to the Congress in 1931, the Commission made a series of recommendations that it be given "adequate supervision and control" over protective service arrangements (*id.* at 121). As finally adopted, the language of Section 1(14)(b) is substantially identical to that recommended by the Commission. Soon after enactment of the statute, the Commission required all railroads to file copies of their protective service arrangements with and obtain approval from the Commission. *Contracts for Protective Services*, 246 I.C.C. 145. This contemporaneous construction by the Commission of its power under the statute, which has been followed consistently thereafter, is entitled to great weight. *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549. Thus, as the courts below held (Pet. App. D-9 to D-10), the Commission has the power to review the railroads' protective service arrangements and to remedy violations of the statute by requiring them to enter into

contracts conforming to its orders.[6] Since the action of the Commission was clearly within its power, there is no reason for further review by this Court.

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[6]The cases cited by petitioners for the proposition that the Commission lacks power to "compel" protective service contracts are inapposite, since they turn upon consideration of the congressional intention underlying wholly unrelated provisions of the Act. In *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, the express congressional denial of power to the Commission to order merger of railroads under 49 U.S.C. 5 was found relevant to its power to order mergers under Section 77 of the Bankruptcy Act. In *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14, the Court explicated the congressional intention in distinguishing between the Commission's power to compel extensions of existing rail lines under 49 U.S.C. 1(21) and its discretionary power to approve a railroad's proposal to build a new line under 49 U.S.C. 1(18).

Petitioners have not attempted to demonstrate why the legislative histories of those provisions affect the congressional intention underlying the instant statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1976.

DOJ-1976-02

CERTIORARI DENIED